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IN THE

Supreme Court of the United States

GUN OWNERS' ACTION LEAGUE, INC.;
OUTDOOR MESSAGE COOPERATIVE, INC.;
MASSACHUSETTS SPORTSMEN JUNIOR
CONSERVATION CAMP, INC., *et al.*,

Petitioners,

v.

JANE SWIFT, Acting Governor,
Commonwealth of Massachusetts, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A 1998 Massachusetts enactment imposes severe criminal penalties for possession of certain firearms, but exempts gun clubs which obtain a special license. The law mandates: "Such club shall not permit shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof, except by public safety personnel performing in line with their official duties." § 131(a), Ch. 140, Massachusetts General Laws. This prohibits use, as a form of political expression, of targets printed with human images that depict historical tyrants, modern terrorists, and similar pictures.

The issue is whether censorship of "human" images printed on targets used at State-licensed shooting ranges, absent any incitement to imminent lawless violence, impermissibly interferes with freedom of expression as protected by the First Amendment to the United States Constitution.

PARTIES TO PROCEEDING

In addition to the petitioners identified in the caption, other petitioners include A.G. GUNS & A, INC.; MARK C; JOHN DOE II; JAMES F. GETTENS; DANA H. CROWE; LORI CROWE; BRIAN E. DUNN; JOHN P. HEARSON; TOM LAROCHE; ANN D. LAROCHE; ROBERT L. WALTER; JOHN DOE I; and GOAL FOUNDATION, INC.

In addition to the respondent identified in the caption, other respondents include THOMAS F. REILLY, Attorney General, Commonwealth of Massachusetts; THOMAS FOLEY, Colonel, Massachusetts State Police; MARTHA COAKLEY, District Attorney, Middlesex County, MA; and EDWARD DAVIS III, Superintendent, Police Department, Lowell, MA.

The corporations which are petitioners here include GUN OWNERS' ACTION LEAGUE, INC.; OUTDOOR MESSAGE COOPERATIVE, INC.; MASSACHUSETTS SPORTSMEN'S JUNIOR CONSERVATION CAMP, INC.; A.G. GUNS & AMMO, INC.; and GOAL FOUNDATION, INC. None of these corporations have any parent companies, and no publicly held company owns 10% or more of the stock of any of these corporations.

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The opinion of the court of appeals is published at 284 F.3d 198 and is printed in the Appendix ("App.") at 1a. The opinion of the district court, App. 38a, is unpublished.

JURISDICTION

On March 25, 2002, the court of appeals rendered judgment affirming the district court's order dismissing the complaint. App. 36a. This Court has jurisdiction under 28 U.S.C. § 1254(l).

CONSTITUTION AND STATUTES

The texts of the following are in the Appendix: United States Constitution, Amendments I and XIV; and pertinent provisions of Massachusetts General Laws, Chapter 140, §§ 121, 129B(6), and 131, and Chapter 269, § 10(m).

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

The complaint was filed on October 21, 1998, the effective date of An Act Relative to Gun Control, Massachusetts Acts 1998. Plaintiffs sought, *inter alia*, a declaratory judgment that a portion of the Act censoring certain targets at licensed shooting ranges violates the right to free speech guaranteed by the First and Fourteenth Amendments to the U.S. Constitution, and sought an injunction against the

enforcement thereof.[1]

Plaintiffs include associations which promote firearms competitions and safety, a shooting sports newspaper, licensed firearm dealers, and individual firearm owners. Defendants include the Governor and various law enforcement authorities of Massachusetts.[2]

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(3), (4). In its Memorandum and Order of September 28, 2000, the district court granted defendants' motion to dismiss pursuant to F.R.Civ.P. 12(b)(1) and (6), deciding that the complaint failed to state on claim on which relief can be granted. App. 38a. It entered an Order of Dismissal on the same date. App. 41a.

The court of appeals, which had jurisdiction under 28 U.S.C. § 1291, issued a decision on March 25, 2002, affirming the district court. App. 1a. The court held, *inter alia*, that the Act does not violate the First and Fourteenth Amendments. App. 23-28a.

Statement of Facts

Petitioners (Plaintiffs-Appellants) include four Massachusetts corporations. Gun Owners' Action League, Inc. ("GOAL"), consisting of 9000 individuals and 200 clubs, promotes gun safety, shooting sports in secondary schools and

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[1] Plaintiffs also alleged that certain definitions in criminal provisions of the Act are unconstitutionally vague. The district court dismissed this claim as unripe, and the court of appeals affirmed. That issue is not before this Court.

[2] Pursuant to Supreme Court Rule 35.3, Thomas Foley is the successor in office of John Difava as Colonel of the State Police.

colleges, development of shooting ranges, and the federal Civilian Marksmanship Program. Its members subscribe to *The Message*, a newspaper published by Outdoor Message Cooperative, Inc. Massachusetts Sportsmen's Junior Conservation Camp, Inc., trains youngsters concerning natural resources and outdoor skills. GOAL Foundation, Inc., promotes gun safety programs for children and instructs Boy Scouts and the U.S. Olympic shooting team. Cir. App. (Circuit Court Appendix) 14-15a.[3]

Petitioners include three businesses licensed by the United States and by Massachusetts as firearm dealers: A.G. Guns & Ammo, Inc.; Mark Cohen, dba The Powderhorn; and John Doe II, who is also a State Trooper. Individual petitioners include an attorney, an engineering manager, parents of juveniles involved in the shooting sports, software engineers, a minister, and retired Army officers, one of whom is disabled and participates in wheelchair competitive shooting. Cir. App. 15-16a.

Respondents (Defendants-Appellees) are responsible for enforcement of the Act, including against plaintiffs and members of plaintiff associations. The Governor, the Attorney General, and the Colonel of State Police enforce the law statewide. The Middlesex County District Attorney and the Lowell Police Superintendent enforce the law in localities where several petitioners reside. Cir. App. 16-17a, 29-30a.

An Act Relative to Gun Control in the Commonwealth, Acts 1998, Chapter 180, which became effective on October 21,

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[3] Unless otherwise indicated, all references to the Circuit Court Appendix refer to the Complaint, the allegations of which must be taken as true in a motion under Rule 12(b)(6).

1998, radically criminalized previously-lawful conduct.[4] The Act defines "large capacity weapon (including firearm [handgun], rifle, and shotgun)" and "large capacity feeding device." Massachusetts General Laws ("M.G.L."), § 121 of Chapter 140. Mere possession of such items without a license is punishable by imprisonment for 2½ to 10 years. § 10(m) of Ch. 269. There are no scienter requirements.

A person with a Class A license may possess any large capacity weapon, and a person with a Class B license may possess a large capacity rifle or shotgun. § 131(a), (b), Ch. 140. The licensing authority "may issue" a license if the applicant is "a suitable person" who "has good reason to fear injury to his person or property, or for any other reason, including the carrying of firearms for use in sport or target practice only." § 131(d). The ability to obtain a license is contingent on the discretion of the licensing authority. Cir. App. 26a.

The Act provides that a gun club may qualify for a Class A license, which authorizes the club to possess and store large capacity weapons, and authorizes the club's members (including those who have no Class A or B license) to use such weapons at the club's shooting range. § 131(a), Ch. 140. "Such club shall not permit shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof . . . ." § 131(a) (¶ 2, last sentence). By contrast, if a club has no Class A license, its members who do not have individual licenses are subject to the above felony penalties for possession of a large capacity weapon.

Petitioner Outdoor Message distributes a target with the caption "Never Again" and the image of Adolf Hitler. Cir. App. 32-33a. The reverse side, entitled "1998—60th Anniversary of

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[4] Relevant portions of the Act are in App. 43a.

the Night of the Broken Glass," reprints newspaper reports from 1938 that, just before attacking Jews, the Nazis ordered all Jews to surrender their firearms. Any who refused were threatened by Gestapo Chief Himmler with 20 years in a concentration camp.[5] A copy of the target is in Cir. App. 84-85a.

The purpose of the target is political discourse. By printing the message behind the target, numerous persons will read the message who may not have done so had it not been printed on a target and taken to a shooting range for use. Shooting at this target is political expression manifesting disapproval of the architect of the Holocaust. Outdoor Message seeks to distribute this target for use at the largest number of shooting ranges possible, including ranges with Class A licenses, and thus to encourage the widest distribution of its political message. Cir. App. 33a.

Plaintiffs and GOAL members belong to gun clubs which refuse to apply for Class A club licenses because such status would forfeit their First Amendment rights. Such persons who do not have individual Class A or B licenses are thus denied the possession or use of large capacity weapons at their clubs. Cir. App. 33-34a. Further, all plaintiffs and GOAL members are prohibited from using the proscribed targets (regardless of gun type) at ranges with Class A licenses. Cir. App. 34a. The Act creates the following Hobson's choice: either forfeit First Amendment rights in order to become a Class

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[5] *See* "Ban on Firearms for Jews," *Boston Globe*, Nov. 12, 1938; "Nazis Smash, Loot and Burn Jewish Shops and Temples," *New York Times*, Nov. 11, 1938, pp. 1, 4, col. 2. For a detailed analysis, *see* S. Halbrook, "Nazi Firearms Law and the Disarming of the German Jews," 17 *Arizona Jour. of International & Comparative Law*, No. 3, 483, 513-27 (2000).

A licensed club, or forego the possession and use of large capacity weapons (or risk felony prosecution for such possession and use).

ARGUMENT

THE WRIT SHOULD BE GRANTED TO RESOLVE WHETHER THE CENSORSHIP OF "HUMAN" TARGET IMAGES AT LICENSED SHOOTING RANGES IS CONSISTENT WITH THIS COURT'S PRECEDENTS UNDER THE FIRST AMENDMENT CONCERNING POLITICAL EXPRESSION AND INCITEMENT TO VIOLENCE

The court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court concerning freedom of expression protected by the First Amendment, particularly the requirement that censorship be justified by imminent lawless violence. Further, to the extent this case involves censorship of a particular type of expression not previously addressed by this Court, the court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. This Court should grant certiorari in order to apply its First Amendment jurisprudence to an unprecedented form of censorship of political expression.

For the first time in world history, a law censors images printed on targets at shooting ranges. A 1998 Massachusetts enactment provides that the colonel of state police may grant a Class A license to a gun club with an on-site shooting range, thereby granting special privileges to the club and its unlicensed members to possess and use what the act characterizes as large

capacity weapons.[6] These special privileges accord Class A licensed-gun clubs and their members exemption from severe felony penalties for possession of large capacity weapons. An individual may also apply for a Class A license, but licensing authorities have considerable discretion to deny applications.[7]

A club which obtains a Class A license is subject to the following form of censorship: "Such club shall not permit shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof, except by public safety personnel performing in line with their official duties." § 131(a) (¶ 2, last sentence). Violation may result in revocation of the license (¶ 3) and a fine of no less than $1000 and no more than $10,000. § 131(a)(¶ 1, last sentence).

This censorship implicates a significant form of political expression. The front page of the *New York Post*, October 2, 2001, shows a picture of a man shooting at targets of Osama

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[6] Section 131(a), Ch. 140, M.G.L., provides:

> The colonel of state police may . . . grant a Class A license to a club or facility with an on-site shooting range or gallery, which club is incorporated under the laws of the commonwealth for the possession, storage and use of large capacity weapons . . . on the premises of such club; provided, however, that not less than one shareholder of such club shall be qualified and suitable to be issued such license; and provided further, that such large capacity weapons and ammunition feeding devices may be used under such Class A club license only by such members that possess a valid firearm identification card issued under section 129B or a valid Class A or Class B license to carry firearms, or by such other persons that the club permits . . . .

[7] The licensing authority may issue a Class A license to "a suitable person" for specified purposes. § 131(d). Great latitude has been accorded authorities in denying licenses. *E.g., Ruggiero v. Police Comm'r of Boston*, 18 Mass.App. 256, 464 N.E.2d 104, 107 (1984).

bin Laden at a shooting range, and notes that proceeds of the target sales went to the Red Cross.[8] While Massachusetts bans this form of defacing human images printed on paper at licensed gun ranges, Afghanistan's former rulers had the opposite fetish -- a "ban on human images" themselves.[9]

The above follows a long tradition of shooting at targets of historical tyrants such as Saddam Hussein, Slobodan Milosevic, and Adolf Hitler. The Founders at the time of the American Revolution shot at pictures of George III.[10] They hung, hacked up, and burned effigies of the King's evil ministers.[11]

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[8] Headlined "Proof, Osama Tipped off his Mama before Attack," the caption explains: "Customers at the Tactical Edge gun range in Riviera Beach, Fla., hang their used Osama bin Laden targets. The targets are being sold for $10 a pop, with proceeds going to the American Red Cross." *See* http://archives.nypost.com/nypost/

Elsewhere, "area gun owners are using Osama bin Laden for target practice. . . . About half of every sale goes to a victim's relief fund ." *The Pittsburgh Channel*, posted Sept. 21, 2001, http://www.thepittsburghchannel.com/pit/news/. Bin Laden targets may be downloaded or purchased over the internet. *E.g.*, www.makempay.com; http://www.osamatargets.com; www.TheGunSearch.com (suggesting "do with this target as your conscience directs you, then mail" to Embassy of Afghanistan).

[9] "Taliban Ban on Idolatry Makes a Country Without Faces," *Washington Post*, Mar. 26, 2001, A20. Humans could not be photographed and human images were required to be destroyed. *Id.*

[10] "Centuries ago, taking a potshot at the image of the king or politician was not only tolerated – it was encouraged." Mathias Tugores, "Historical Painted Targets," *American Rifleman*, 47 (Feb. 2001) (picturing targets with human images).

[11] "The Stamp Act was to go in force on November 1st, [1765,] and on that day in Boston, . . . effigies of Grenville and Huske were hung

When Massachusetts ratified the federal Constitution in 1788, the mass celebrations in Boston included the following:

> In a cart, drawn by five horses, the British flag was displayed, and insulted by numbers placed in the cart, armed with muskets, who repeatedly discharged the contents of them through the tattered remnant, in contempt of that faithless nation, whose exertions have been unremitted since the peace, to cramp our commerce and obstruct all our nautical proceedings.[12]

Targets containing human images include either a terrorist or dictator who controls a state or organization with which the United States is at war, or "bad guys" in sinister or silhouette form representing criminals. Historically, targets with human images also have included neutral subjects such as comical figures, skeletons, mythological figures, and countless other forms. Sometimes the human images are simply part of the target but not the bullseye, in other cases the human images are the target. Many such targets, bullet holes intact, may be found in art museums throughout Europe. A book with scores

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on the Liberty Tree, to be carted through the town later and cut to pieces. Similar scenes were enacted throughout New England." (Huske suggested the Act to British cabinet head George Grenville.) 2 James Truslow Adams, *Revolutionary New England, 1691-1776*, at 333 (1923).

[12] 7 *Documentary History of the Ratification of the Constitution*, eds. John P. Kaminski and Gaspare J. Saladino (Madison: State Historical Society of Wisconsin, 2001), 1612. One man objected that "the Bostonians have acted very imprudently in Carrying the King of Englands Coulors in a Cart pulld with five Horses, armed with muskets and fireing through the same with Great Indecent Speches about England and &c." *Id.* at 1612 n.2.

of photographs of such targets was published in Communist East Germany as a contribution to art history.[13]

Eve holds up an apple – the bullseye of the target – as Adam looks on, in an exquisite masterpiece painted in 1780, now housed in the Czech National Museum.[14] Neptune is the bullseye of a 1790 target kept in the By Museum in Copenhagen.[15] A 1610 target depicts a group of women shooting funny little men out of a tree.[16] It is doubtful that competitors at shooting festivals where these innocuous targets hung centuries ago were thereby motivated to commit murders.

Today, Massachusetts bans shooting at paper human images at licensed ranges, with an exception for law enforcement. The political content of this State-imposed message is that private citizens, but not the police, should be pacifists. The complaint alleges that this violates free speech, particularly where the target is a picture of a historical tyrant against whom one wishes to express political disapproval. Cir. App. 31-31a. It also alleges that the provision is irrational and violates equal protection. Cir. App. 32a.

The District Court dismissed this claim on the basis that "the Act's regulation of shooting at targets shaped like human beings addresses conduct, not expression." App. 39a, citing *United States v. O'Brien*, 391 U.S. 367 (1968) (draft-card burning case).

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[13] Anne Braun, *Historische Zielscheiben [Historical Targets]* (Edition Leipzig, German Democratic Republic, 1981).

[14] *Id.*, No. 78.

[15] *Id.*, No. 61.

[16] *Id.*, No. 21.

The Court of Appeals affirmed, but for different reasons. It notes: "No court has recognized target shooting as a constitutionally protected form of expression."[17] App. 24a. Of course, neither is starting fires, but shooting at a picture of Osama bin Laden is every bit as much a form of political expression as burning the American flag. Yet the state may no more prohibit burning the American flag than it may prohibit shooting at a picture of Hitler. As long as the flag burning does not violate the fire code and the target shooting is conducted at a lawful shooting range, the First Amendment permits both as symbolic activities.

The Court of Appeals "assum[ed] for the purpose of the content-neutral/content-based analysis that the target shooting at human figures described by the defendants [*sic*] is expressive conduct entitled to some degree of First Amendment protection." App. 25a. "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* at 23-24a, quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Repeating Governor Swift's argument[18] that "the Act's purpose was to stop target practice that arguably increases the practicer's capacity to shoot human beings," the Court of Appeals decided:

There is an obvious connection between the

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[17] "This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority." *Kingsley International Pictures Corp. v. Regents of the Univ. of the State of New York*, 360 U.S. 684, 689 (1959).

[18] "Swift" refers to Acting Governor Jane Swift and the other respondents.

> Commonwealth's interest in preventing gun fatalities and its decision to restrict the shooting practices of certain gun clubs. A person who has practiced shooting at a human-shaped target will likely be more proficient at shooting humans than a person who has had to practice at a circular target. This rationale is a believable, reasonable, content-neutral justification for the provision.

Id. at 24a.

The above connection is hardly obvious. All Massachusetts gun owners must pass rigorous criminal background checks and have, at a minimum, a Firearms Identification (FID) Card. §§ 129B, 129C, of Chapter 140, M.G.L. To use a large capacity weapon at a Class A licensed club, a person must have an FID card or be supervised by a member who has a Class A or B license. § 131(a) of Chapter 140, M.G.L. To suggest that shooting at a picture of Osama bin Laden at a licensed range out of a sense of patriotism would encourage unlawful homicides defames law-abiding gun owners. The state must have "*evidence* that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *City of Los Angeles v. Alameda Books, Inc.*, 2002 U.S. LEXIS 3424, *25 (2002) (emphasis added) (relying on police department study of crime rates). "This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." *Id.* at *26.

Moreover, nothing on the face of the statute or in the legislative history suggests that the statute was intended to discourage unlawful homicides. "[W]e have generally only

sustained statutes on the basis of hypothesized justifications when reviewing statutes merely to determine whether they are rational." *Thompson v. Western States Medical Center*, 122 S. Ct. 1497, 1507 (2002).[19] The use of tyrant targets is political speech, to which the strict scrutiny test applies.[20] The statute on its face suggests that its framers were simply offended by such targets and wished to impose a symbolic form of pacifism.

Despite the obvious content of the censorship – "human images" – the Court of Appeals called the restriction "content neutral" because, while plaintiffs "are not allowed to shoot at pictures of tyrants," "supporters of tyrants are affected in the same way by the statute: they cannot shoot at images of advocates of freedom." App. 25a. Contrary to the court, this is hardly a case where "the governmental interest is unrelated to the suppression of free expression." *Id.* at 26a, quoting *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

The law is not content neutral, in that it does not ban shooting at all targets, but only at targets printed with disfavored images. The target may not depict "human" figures, effigies, silhouettes or images, but may depict any non-human figures, effigies, silhouettes or images. By the court's logic, the state could ban the burning of national flags as long as all were included, from the flag of the United States to that of Iraq. One

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[19] Even the less strict test for commercial speech "is significantly stricter than the rational basis test, however, requiring the Government not only to identify specifically 'a substantial interest to be achieved by [the] restriction on commercial speech,' . . . but also to prove that the regulation 'directly advances' that interest and is 'not more extensive than is necessary to serve that interest.'" *Id.* at 1507 (citation omitted).

[20] *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926-27 (1982) ("highly charged political rhetoric lying at the core of the First Amendment").

would be left free to burn other kinds of flags (such as that of the Boy Scouts). Broadening the scope of the censorship does not make it content neutral. "As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 2002 U.S. LEXIS 3421, *18 (2002) (citations and quotation marks deleted).

Claiming content neutrality and applying an intermediate level of scrutiny, the Court of Appeals asserts: "The state has a particular interest in preventing those unlicensed to use large capacity weapons from becoming proficient at shooting humans with such weapons."[21] App. 26a-27a. The court also claims that the censorship is "narrowly tailored" in that it applies only in Class A licensed clubs, the only place where an unlicensed person may shoot large-capacity weapons. This is hardly a narrow tailoring. The legitimate State interest in discouraging murder is served by punishing murder, not by imposing censorship.

Finally, the Court of Appeals concludes that alternative means of communication exist. But if bin Laden can be denounced "via writing, the Internet, word of mouth," App. 27a, so too can the American flag be so denounced, but that does not justify a ban on burning the flag. Similarly, the censorship is not justified by the "alternative channel" that plaintiffs "may shoot at such images at any place where they can lawfully shoot at targets, other than gun clubs with a Class A

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[21] This assertion is doubly curious. First, the censored targets may not be used at the licensed club's range at all, without regard to the type of gun or whether the individual is licensed. Second, becoming proficient in target shooting has much to do with the type of sights used but nothing to do with whether a weapon is "large capacity," which relates to whether one has actual possession of a large capacity magazine. App. 19a.

license." App. 28a. This alternative does, however, impeach the argument that citizens who shoot at targets with human images are likely to commit unlawful homicides. If true, Massachusetts would have banned such expression at all places.[22]

Swift argued below that the ban on target images does not censor speech but "regulates the conduct of unlicensed persons who practice shooting large capacity weapons at humans."[23] Br. of Appellees 47. Yet the Act prohibits shooting at pictures, not "at humans," and thus seeks to regulate one's thoughts. The only conceivable reason to shoot at a picture of bin Laden or Hitler is symbolic expression, but Swift asserted: "A target depicting a human is not a symbol. Rather, it is an object that permits a person to become more proficient at using deadly force on a human being." Br. 48. The premise of this statement is the pacifist dogma that it is wrong ever to use deadly force against another, even in lawful defense of innocent life against a deadly aggressor.

This goal of civilian pacifism is not a lawful purpose, in that the law allows one to use deadly force to protect life from unlawful aggression.[24] The means to this purpose is not lawful,

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[22] *See Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (law banning the disclosure of alcohol content on beer labels but allowing it on wine and spirit labels violates equal protection).

[23] M.G.L. c. 140, § 131(a), provides broadly that "such club shall not permit shooting at targets that depict human figures," without regard to whether a person is licensed or whether the weapon is large capacity.

[24] *Commonwealth v. Fisher*, 433 Mass. 340, 352, 742 N.E.2d 61 (2001). "All people . . . have certain natural, essential and inalienable rights; among which may be reckoned the right of . . . defending their lives . . . ." Mass. Declaration of Rights, Part 1, Art. I. "The right to defend

because it seeks to suppress expression inconsistent with the pacifist message.

It would be ironic if the First Amendment allowed the state to ban shooting at pictures of Adolf Hitler and Osama bin Laden but not to ban burning the American flag. In *Texas v. Johnson*, 491 U.S. 397, 399 (1989), the defendant burned an American flag in front of the city hall. "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Id.* at 403-04. Shooting at a picture of a dictator or a terrorist certainly meets this test.

Governor Swift argued in the court below for an exception to this rule if the message (such as shooting at the Hitler picture) is not "widely accepted as a symbolic act." Br. 52. Yet "there is a long tradition of widespread lawful gun ownership by private individuals in this country,"[25] and Americans have probably shot at more targets of perceived historical evil doers, from George III to Osama bin Laden, than they have burned American flags. In any event, First Amendment protection has never rested on what is "widely accepted."

Johnson rejected the arguments that the flag-desecration prohibition was justified to prevent breach of the peace and to preserve the flag as a symbol of national unity. *Id.* at 407. A

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oneself from a deadly attack is fundamental." *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982).

[25] *Staples v. United States*, 511 U.S. 600, 610 (1994). "Roughly 50 percent of American homes contain at least one firearm of some sort . . ." *Id.* at 613-14.

"function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* at 409. While it may disturb pacifists' sensibilities that a civilian may shoot at a target with a human image, that does not justify a prohibition on such expression.[26]

Johnson distinguished *O'Brien*, the draft-card case, explaining:

> If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. . . . If it is, then we are outside of *O'Brien's* test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.

Johnson, 491 U.S. at 403, quoting *O'Brien*, 391 U.S. at 377.

O'Brien burned his draft registration certificate on the steps of the South Boston Courthouse. This Court upheld the prohibition on destruction of the certificate because there was a compelling interest in its preservation as an official document for the functioning of the Selective Service System.[27] 391 U.S.

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[26] The law "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 579 (1995).

[27] The certificate is proof of registration, it facilitates communication with the local board, it reminds its bearer of certain duties, and the prohibition discourages deceptive misuse of certificates. *Id.* at 378-79.

at 377. However, *O'Brien* did not imply that the state could prohibit the burning of an image (such as a xerox copy) of a draft card. By contrast, the law here bans shooting at a target with the content of any human image.

Johnson stresses that the state may not "proscribe particular conduct because it has expressive elements." The *O'Brien* test is limited "to those cases in which 'the governmental interest is unrelated to the suppression of free expression.'" *Johnson*, 491 U.S. at 406. The state argued that flag burning diminishes nationhood and unity, to which this Court replied: "These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related 'to the suppression of free expression' within the meaning of *O'Brien*. We are thus outside of *O'Brien*'s test altogether." *Id.* at 410. The result is the same here: the State does not like the message it believes is portrayed in shooting at a piece of paper picturing a human image.

The State may compel neither the pacifist message here nor the opposite message, such as the slogan "Live Free or Die" on car tags. *Wooley v. Maynard*, 430 U.S. 705 (1977). A State may not "require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Id.* at 713. "New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message – or suffer a penalty." *Id.* at 715. The law here requires that Class A licensed clubs use their private property – shooting ranges with sanitized targets – as a billboard for the State's pacifist ideology. The fact that the club has a State-issued license makes no more difference than the

fact that in *Wooley* the tag was State-issued.[28] "Where the State's interest is to disseminate an ideology, . . . such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id.* at 717.

Alas, "firing a gun is inherently dangerous, and the Commonwealth can regulate such conduct without running afoul of the First Amendment." Swift Br. 54. But firing a gun at a picture of Adolf Hitler is no more dangerous than firing a gun at a bullseye target, which Governor Swift admitted when she stated that "if they [plaintiffs] wish to fire at pictures of Hitler, they can do [*sic*] at any place where it is legal to fire (other than Class A clubs) . . . ." Br. 50.

The existence of alternative forums – unlicenced ranges where one can shoot at targets with human images – does not justify the ban. As *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975), explains:

> Whether petitioner might have used some other, privately owned, theater in the city for the production is of no consequence. . . . Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

Holding that live drama is protected expression, this Court further noted: "By its nature, theater usually is the acting out – or singing out – of the written word, and frequently mixes

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[28] Similarly, the issuance by a State of a license to sell alcohol would not allow the State to prohibit throwing darts at a human image (perhaps Blackbeard the pirate) at the licensed premises.

speech with live action or conduct."[29] *Id.* at 557-58. Could the Commonwealth ban dramatization of William Tell shooting the apple off his son's head or, more to the point, shooting the tyrant Gessler through the heart?[30]

"Nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses – so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not." *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992). *R.A.V.* invalidated a ban on displays or symbols that insult or provoke violence "on the basis of race, color, creed, religion or gender." "The ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[31] *Id.* at 381.

Whether as political speech or training for lawful self-defense, shooting at targets printed with human images does not

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[29] Moreover, "entertainment, as well as political and ideological speech, is protected" by the First Amendment. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) (nude dancing). The State may not ban use of certain target images even if used for recreation or training rather than political speech.

[30] *See* Schiller, *Wilhelm Tell* 87-89, 118 (1972). The Tell play has a strong political message, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633 n.13 (1943), and it is obvious why Hitler forbade the play from being performed in Germany or read in the schools. Jürg Fink, *Die Schweiz aus der Sicht des Dritten Reiches [Switzerland in the Eyes of the Third Reich], 1933-1945* (Zürich: Schulthess Polygraphischer, 1985), 22-23.

[31] *See Virginia v. Black*, 262 Va. 764, 553 S.E.2d 738 (2001) (invalidating cross-burning prohibition), *cert. granted*, No. 01-1107 (May 28, 2002).

constitute advocacy of violence. Even if it did, the First Amendment does not permit the state "to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).[32] Shooting at a target with a human image does not incite imminent lawless action.

This Court reiterated this standard most recently in *Ashcroft v. Free Speech Coalition*, 152 L. Ed. 2d 403, 122 S. Ct. 1389, 1399 (2002), as follows: "The prospect of crime, however, by itself does not justify laws suppressing protected speech."[33] The decision adds, "the First Amendment bars the government from dictating *what we see* or read or speak or hear." *Id.* (emphasis added). The Act here seeks to prevent people from seeing holes puncturing pieces of paper with certain images, as it may supposedly encourage them to think homicidal thoughts. But this Court explained:

> The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private

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[32] *Brandenburg* held the following actual and symbolic speech, albeit hateful, to be protected: "One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. . . . [P]hrases could be understood that were derogatory of Negroes and, in one instance, of Jews." *Id.* at 445-46.

[33] "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech." *Id.*, quoting *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N. Y.*, 360 U.S. 684, 689 (1959).

thoughts."

Id. at 1403 (citation omitted).

The rationale by the court of appeals here flatly contradicts this Court's holding that "the government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" *Id.* at 1403, quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973). "There is here no attempt, incitement, solicitation, or conspiracy." *Id.*

One further principle of *Free Speech Coalition* is applicable here: "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Id.* at 1404. The court of appeals failed to consider this factor.[34] One might argue about whether shooting at a target with a plain black silhouette is political speech, although banning the practice would be impermissible thought control. But it is plain that shooting at a picture of a tyrant or even of a criminal-looking image is political speech. The Act thus bans a substantial amount of protected speech.

Video games may allow a far more realistic, interactive experience of engaging in violence than shooting at a piece of paper – you can even shoot and kill moving bin Laden targets and watch the blood flow[35] – but the First Amendment forbids

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[34] The court of appeals claimed to utilize "intermediate" scrutiny, but where the above principle applies, then also: "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson v. Western States Medical Center*, 122 S. Ct. 1497, 1506 (2002).

[35] *E.g.*, "Shoot To Kill Osama - Free online shoot em up game," http://www.policehumor.com/killosama; "Gamers Blow bin Laden Away," http://www.wired.com/news/culture/0%2C1284%2C47226%2C00.html.

a prohibition on such games.[36] "The notion of forbidding not violence itself, but pictures of violence, is a novelty . . . ." *American Amusement Machine Ass'n. v. Kendrick*, 244 F.3d 572, 575 (7th Cir.), *cert. denied*, 122 S. Ct. 462 (2001) (finding nothing in the record to show that video games in which players shoot at monsters incite youthful players to breaches of the peace).[37] Nor has shooting at targets with human images incited anyone to shoot at actual humans.

Target images and other pictures are protected by the First Amendment just as much as words, for "the Constitution looks beyond written or spoken words as mediums of expression." *Hurley*, 515 U.S. at 569. Visual images are "a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943). Photographs, prints, and paintings "are entitled to full First Amendment protection." *Bery v. City of New York*, 97 F.3d 689, 696 (2nd Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997). Human and animal images are protected. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54-55 (1988) (*e.g.*, "the early cartoon portraying George Washington as an ass"); *Lighthawk v. Robertson*, 812 F. Supp. 1095 (W.D. Wash. 1993)

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[36] *See Wilson v. Midway Games, Inc.*, 2002 U.S. Dist. LEXIS 6070 (D. Conn. 2002) (First Amendment protects Mortal Kombat game, even if it "caused violence and physical harm" to a person, unless it meets this Court's *Brandenburg* test).

[37] *See Watts v. United States*, 394 U.S. 705 (1969) (finding the following to be "political hyperbole": "If they ever make me carry a rifle the first man I want to get in my sights is L. B. J. . . . They are not going to make me kill my black brothers.").

(caricature of Smokey Bear).

Even without application of the strict scrutiny test, the censorship fails the rational basis test. Anyone is allowed to shoot at the images in question except at the shooting range of a licensed club. As the exemption for public safety personnel recognizes, shooting at realistic targets promotes safety in training for lawful self defense by increasing the chance of hitting the target rather than innocent bystanders. Cir. App. 32a. Governor Swift's argument below that plaintiffs' wish to shoot at the Hitler target is "contrived"[38] and that they really want "to practice shooting at humans," Br. 51, is hardly inconsistent with plaintiffs' larger free speech claim. Cir. App. 31-34a.

It goes without saying that the Commonwealth need not have provided the benefit of a Class A license to gun clubs. Having provided the benefit, it may not violate the First Amendment. *44 Liquormart v. Rhode Island*, 517 U.S. 484, 513 (1996), explains:

> That the State has chosen to license its liquor retailers does not change the analysis. Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right. . . . [G]overnment "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech."

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[38] *See Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (the fact that a black wishing to test segregated seating "may have boarded this particular bus for the purpose of instituting this litigation is not significant").

(Citation omitted.)[39]

In sum, the complaint states a valid claim that the target censorship law violates the right to free speech. Shooting at a picture is every bit as protected by the First Amendment as is hanging a person in effigy. Despite intense public criticism, this Court has been solicitous of protecting the right of dissenters publically to desecrate the American flag, and should be equally solicitous of protecting the right of patriotically-minded persons at shooting ranges to desecrate images of persons they deem America's enemies.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit.

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[39] *See Gavett v. Alexander*, 477 F. Supp. 1035, 1044-45 (D. D.C. 1979) (civilian purchase of military rifles in Civilian Marksmanship Program may not be conditioned on violation of First Amendment).

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 00-2357

GUN OWNERS' ACTION LEAGUE, INC.; OUTDOOR MESSAGE COOPERATIVE, INC.; MASSACHUSETTS SPORTSMEN'S JUNIOR CONSERVATION CAMP INC.; A.G. GUNS & AMMO, INC.; MARK COHEN; JOHN DOE II; JAMES F. GETTENS; DANA H. CROWE; LORI CROWE; BRIAN E. DUNN; JOHN P. HEARSON; TOM LAROCHE; ANN D. LAROCHE; ROBERT L. WALTER; JOHN DOE I; GOAL FOUNDATION, INC.,

Plaintiffs, Appellants, v.

JANE SWIFT, Acting Governor, Commonwealth of Massachusetts; THOMAS F. REILLY, Attorney General, Commonwealth of Massachusetts; JOHN DIFAVA, Colonel, Massachusetts State Police; MARTHA COAKLEY, District Attorney, Middlesex County, MA; EDWARD DAVIS, Superintendent, Police Department, Lowell, MA,

Defendants, Appellees.
APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF
MASSACHUSETTS

[Hon. George O'Toole, U.S. District Judge]

Before

Torruella and Lipez, Circuit Judges,

and Zobel,* District Judge

Stephen P. Halbrook, with whom Edward F. George, Jr. was on brief for appellants.

Edward J. DeAngelo, Assistant Attorney General, with whom Thomas F. Reilly, Attorney General of Massachusetts, and Adam Simms, Assistant Attorney General, were on brief for appellees.
Edward L. Morris on brief for appellee Edward Davis.
Michael Paris, Benjamin S. Albert, Randall E. Ravitz, and Brown Rudnick Freed & Gesmer, on consolidated brief for The Center to Prevent Handgun Violence, the International Brotherhood of Police Officers, the American Academy of Child and Adolescent Psychiatry, the American Association of Suicidology, the American Medical Student Association, the American Public Health Association, the Massachusetts Brain Injury Association, and Stop Handgun Violence, Inc., amici curiae.

March 25, 2002, Decided

LIPEZ, Circuit Judge. This case requires us to consider the constitutionality of "An Act Relative to Gun Control in the Commonwealth," a law that placed new restrictions on guns classified as "Large Capacity Weapons," and increased the penalties for unlicensed possession. 1998 Mass. Acts ch. 180, §§ 1-80 (codified in Mass. Gen. Laws ch. 140 et seq.) ("Act"). Plaintiffs allege that the Act is unconstitutional because of the vagueness of important

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* Of the District of Massachusetts, sitting by designation.

definitions within the Act. They allege the same infirmity in a related furnishing statute. They also assert that the Act's regulation of certain gun clubs violates their rights to freedom of expression, equal protection and freedom of association. In response to the Commonwealth's motion to dismiss, the district court dismissed all of the counts. We affirm.

I. Background

A. Provisions of the Act

Given the facial challenge to the 1998 gun control law, we must describe the law in some detail.

1. Licensing of "Large Capacity Weapons"

Owners of firearms in the Commonwealth of Massachusetts have long needed to license these weapons. See 1906 Mass. Acts 172 (requiring license for carrying loaded pistol). Before the Act went into effect, a two-tiered licensing system prevailed, based on the categories of (1) rifles and shotguns and (2) "firearms," including pistols, revolvers, and other guns with short barrels. Mass. Gen. Laws ch. 140, § 121 (1997). A citizen with a license could possess all these weapons, while a citizen with a Firearms Identification Card ("FID Card") could only possess rifles and shotguns. Mass. Gen. Laws ch. 140, §§ 121, 129C, 131 et seq. (1997).

The Act created a three-tiered licensing system by devising a new classification for large capacity weapons. Mass. Gen. Laws ch. 140, § 121. A Class A license entitles its possessor to own any type of weapon, including a large capacity weapon. Mass. Gen. Laws ch. 140, § 131(a). A person with a Class B license can possess only weapons, be they rifles, shotguns, or firearms, that are not large capacity weapons.

Mass. Gen. Laws ch. 140, § 131(b). A person with an FID Card has the same rights as someone with a Class B license except that he or she cannot carry firearms. Mass. Gen. Laws ch. 140, § 129C. Again, firearms are pistols, revolvers, and guns with short barrels. Id.

The Act defines a "large capacity weapon" as "any firearm, rifle or shotgun:

> (i) that is semiautomatic with a fixed large capacity feeding device; (ii) that is semiautomatic and capable of accepting, or readily modifiable to accept, any detachable large capacity feeding device; (iii) that employs a rotating cylinder capable of accepting more than ten rounds of ammunition in a rifle or firearm and more than five shotgun shells in the case of a shotgun or firearm; or (iv) that is an assault weapon.

Mass. Gen. Laws ch. 140, § 121. A "large capacity feeding device" is:

> (i) a fixed or detachable magazine, box, drum, feed strip or similar device capable of accepting, or that can be readily converted to accept, more than ten rounds of ammunition or more than five shotgun shells; or (ii) a large capacity ammunition feeding device as defined in the federal Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. § 921(a)(31).

Id. The statute also excludes certain weapons from the definition of large capacity weapons:

> The term "large capacity weapon" shall be a secondary designation and shall apply to a weapon in addition to its primary designation as a firearm, rifle or shotgun and shall not include: (i) any weapon that was manufactured

> in or prior to the year 1899; (ii) any weapon that operates by manual bolt, pump, lever or slide action; (iii) any weapon that is a single-shot weapon; (iv) any weapon that has been modified so as to render it permanently inoperable or otherwise rendered permanently unable to be designated a large capacity weapon; or (v) any weapon that is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and which is not intended for use as a functional weapon and cannot be readily modified through a combination of available parts into an operable large capacity weapon.

Id.

2. The Roster of Large Capacity Weapons

To ensure that its prohibitions are clarified as needed, the Act provides that the Secretary of the Executive Office of Public Safety ("Secretary") shall publish and distribute a "roster" of weapons which fit the statutory definition of "large capacity weapons." Mass. Gen. Laws ch. 140, § 131 3/4. The Secretary has compiled and published the roster. The roster is presently available on the web site of the Executive Office of Public Safety. The first roster was issued on October 14, 1998, one week before the effective date of the Act.

The roster is not intended as an exhaustive list of weapons deemed "large capacity" under the terms of the Act, but it does list dozens of weapons considered "large capacity weapons" under the Act. Executive Office of Public Safety, Large Capacity Weapon Roster Effective February 15, 2002. The Secretary also prefaced the roster with clarifications of some elements of the statutory definition of large capacity weapons, including the terms "capable of accepting" and "readily

modifiable to accept" a large capacity feeding device. Id.

3. The Licensing Process

Anyone seeking a Class A or B license may apply either to the local chief of police or the Colonel of the State Police. Mass. Gen. Laws ch. 140, § 131(d). The licensing authority may issue the license if 1) the applicant is not automatically disqualified by reasons listed in the statute (such as prior conviction of certain crimes) and 2) the licensing authority determines that the applicant is a "suitable person" and has reason for the license. Id. A person seeking an FID card may apply to the local chief of police. Mass. Gen. Laws ch. 140, § 129B. The chief of police must issue the license unless a listed reason disqualifies the applicant. Id. Anyone denied either a Class A or B license or an FID card may challenge that denial in the courts of the Commonwealth. Mass. Gen. Laws ch. 140, §§ 129B(5), 131(f).

4. Criminal Provisions

Both before and after the Act, anyone who "knowingly" possessed weapons without proper state licensing could be punished by imprisonment. Mass. Gen. Laws ch. 260, § 10(a) (1997). The Act provided for a specific term of punishment for knowing unlicensed possession of a large capacity weapon: between two-and-a-half and ten years in prison. Mass. Gen. Laws ch. 269, § 10(m). The Act also increased existing penalties for firearms dealers who sell weapons to persons who do not have the license necessary to possess such weapons. Mass. Gen. Laws ch. 269, § 10F.

The Act also amended existing restrictions on the selling or furnishing of weapons to persons under a certain age. Massachusetts law prohibits selling or furnishing a rifle or shotgun to anyone under the age of 18, and prohibits selling or

furnishing a firearm or large capacity weapon to anyone under 21 years of age. Mass. Gen. Laws ch. 140, § 130. The Act updated the furnishing statute so that it would reflect the new three-tier licensing scheme. Id. It also increased the penalties for selling or furnishing such weapons to underage individuals. Id.

5. Class A-Licensed Gun Clubs

Like individuals, organizations (such as gun clubs) can also possess weapons. There is no statutory requirement that a gun club not using large capacity weapons obtain a license. However, a gun club which possesses and stores large capacity weapons must obtain a Class A license. According to the Act, a gun club with a Class A license can possess, store, and use large capacity weapons. Mass. Gen. Laws ch. 140, § 131(a). A member of a Class A-licensed gun club may use large capacity weapons, even if the member does not possess a Class A license, provided that the member has at least a Class B license or an FID card. Id. A Class A licensed gun club can permit non-members without a license or an FID card to use large capacity weapons, provided that such non-members fire under the supervision of a certified firearms safety instructor or a properly licensed club member. Id.

Gun clubs which want to possess and store large capacity weapons must apply to the Colonel of the State Police in order to obtain a Class A license. Id. According to the statute, "the colonel of state police may, after an investigation, grant a Class A license to a club or facility with an on-site shooting range or gallery . . provided, however, that not less than one shareholder of such club shall be qualified and suitable to be issued such license." Id.

The Act also regulates target-shooting at Class A-licensed clubs. Plaintiffs challenge a regulation preventing

such gun clubs from permitting "shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof, except by public safety personnel performing in line with their official duties." Id. A person lawfully licensed and shooting in a place where it is lawful to fire weapons (other than a Class A-licensed club) may shoot at a target depicting a human figure.

B. The Plaintiffs and their Challenges to the Act

The sixteen plaintiffs who have filed suit to enjoin enforcement of the Act may be divided into three classes. The business plaintiffs, all of whom are licensed by the Commonwealth of Massachusetts and the United States as firearms dealers, are A.G. Guns & Ammo, Inc., Mark Cohen (d/b/a The Powderhorn), and John Doe II (a state trooper). The individual plaintiffs include an attorney, an engineering manager, parents of juveniles involved in shooting sports, software engineers, a minister, and retired Army officers (one of whom is disabled and participates in wheelchair competitive shooting). Four Massachusetts corporations are associational plaintiffs: the Gun Owners Action League ("GOAL") (which consists of 9,000 individuals and 200 clubs), Outdoor Message Cooperative, Inc. (which publishes a newspaper for GOAL members), the Masachusetts Sportsmen's Junior Conservation Camp, Inc. (which trains youth in outdoor skills, including shooting), and GOAL Foundation, Inc. (which promotes gun safety programs for children).

These businesses, individuals, and associations have challenged the constitutionality of the Act by suing the Governor and Attorney General of Massachusetts, and other officials who enforce it. Their original complaint consisted of ten counts. The district court granted the defendants' motion to dismiss with respect to all ten counts. Appellants appeal only

the dismissal of Counts 1, 3, 4, 6, and 10. The counts may be grouped as follows:

Vagueness Counts: Count 4 alleges that the Act's definition of a large capacity weapon is unconstitutionally vague; Count 6 alleges the same regarding the Act's definition of large capacity feeding device. The plaintiffs claim that these vague definitions leave thousands of gun owners in Massachusetts unable to determine whether they need to license their guns as large capacity weapons. Count 10 alleges that the Act's definition of "furnishing" weapons and ammunition to persons under 21 is also vague.

Freedom of Expression Count: Count 1 alleges that the Act's "censorship of target images violates free speech and equal protection." The statute prohibits shooting at human-shaped targets or human images at Class A gun clubs. The plaintiffs believe that this regulation either is designed to curtail the expressive conduct of shooting at human images, or, even if not intended to do so, nevertheless impermissibly limits that conduct.

Equal Protection and Freedom of Association Count: Count 3 alleges that restricting Class A licenses to "incorporated clubs with shareholders. . . . irrationally discriminates against incorporated clubs without shareholders and their members and violates the right to freedom of association." The plaintiffs allege that the shareholder requirement bears no rational relationship to the statute's purported aims. They also argue that the "Act offends freedom of association by granting special privileges to members of stock-corporation clubs and denying such privileges to persons who are not members of such clubs and cannot obtain a Class A license."

C. The Decision Below

The District Court dismissed appellants' vagueness

challenge on ripeness grounds, finding that "none of these claims is ripe as to any of the plaintiffs." The court added that, even if ripe, the vagueness challenges were not "meritorious" because "the definitions for the purposes of the Act's licensing requirements do not regulate or limit constitutionally protected conduct . . . . [and are] not impermissibly vague in all applications."[1] The district court dismissed the freedom of expression claim (Count 1) on the ground that the Act regulated conduct, not speech. It also summarily dismissed the freedom of association claim (Count 3) "for the reasons the defendants have pointed out;" namely, that gun clubs do not need to obtain Class A licenses and that Class A licenses do not require their possessors to espouse any viewpoint.

"We will affirm the dismissal of the complaint if, and only if, accepting all well-pleaded facts as true and drawing all reasonable inferences in favor of the plaintiff, the complaint 'fails to state a claim upon which relief can be granted.'" Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co., 228 F.3d 24, 30 (1st Cir. 2000) (quoting Fed. R. Civ. P. 12(b)(6)). Therefore, "the complaint is properly dismissed only when the allegations are such that 'the plaintiff can prove no set of facts to support [the] claim for relief.'" Id. (quoting Rockwell v. Cape Cod Hosp., 26 F.3d 254, 260 (1st Cir. 1994)). We review below each element of the dismissal, considering the vagueness

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[1] The Supreme Court has held that a facial vagueness challenge to a statute may only succeed if the plaintiff "demonstrates that the law is impermissibly vague in all of its applications." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982) (upholding anti-drug paraphernalia ordinance); see also Whiting v. Town of Westerly, 942 F.2d 18, 21-22 (1st Cir. 1991) (upholding town ban on sleeping in public place).

challenges in Part II, the First Amendment challenge to the prohibition on shooting at human-shaped targets in Part III, the equal protection challenge to the licenses for Class A gun clubs and facilities in Part IV, and the freedom of association claim in Part V.

II. Vagueness

In appealing the dismissal of the vagueness counts (Counts 4, 6, 10), the appellants argue that they cannot determine whether they own the types of weapons regulated by the Act, putting them at risk of a violation of a criminal law. Hence, they claim that the statutory prohibitions on owning large capacity weapons and furnishing weapons to persons under 21 are facially unconstitutional.

The first statutory definition of a large capacity weapon is "any firearm, rifle or shotgun: (i) that is semiautomatic with a fixed large capacity feeding device."[2] Mass. Gen. Laws ch.

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[2] A "firearm" is defined in the statute as

> a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than 16 inches or 18 inches in the case of a shotgun as originally manufactured; provided, however, that the term firearm shall not include any weapon that is: (i) constructed in a shape that does not resemble a handgun, short-barreled rifle or short-barreled shotgun including, but not limited to, covert weapons that resemble key-chains, pens, cigarette-lighters or cigarette-packages; or (ii) not detectable as a weapon or potential weapon by x-ray

140, § 121. The Act further defines a "large capacity feeding device" to include a magazine or similar device "capable of accepting, or that can be readily converted to accept, more than ten rounds of ammunition or more than five shotgun shells." Id. According to their complaint, "several plaintiffs . . . possess semiautomatics with fixed tubular feeding devices that accept no more than 10 rounds of the ammunition they possess or no more than five of the shotgun shells they possess. However, such persons have no way of knowing if these feeding devices will accept more rounds or shells of shorter lengths." In other words, the plaintiffs complain that they cannot determine the scope of the definition without ascertaining (and continuing to ascertain) the exact dimensions of available ammunition.

The second statutory definition of large capacity weapon includes any weapon "that is semiautomatic and capable of accepting, or readily modifiable to accept, any detachable large capacity feeding device." Id. According to the plaintiffs:

> The term "capable of accepting" a feeding device that will accept more than ten rounds could be interepreted at least five ways: (1) the owner must actually possess such a device; (2) the owner does not possess the

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> machines commonly used at airports or walk-through metal detectors.

Mass. Gen. Laws ch. 140, § 121. A "rifle" is a weapon having "a rifled bore with a barrel length equal to or greater than 16 inches and capable of discharging a shot or bullet for each pull of the trigger." Id. A "Shotgun" is a weapon having "a smooth bore with a barrel length equal to or greater than 18 inches with an overall length equal to or greater than 26 inches, and capable of discharging a shot or bullet for each pull of the trigger." Id.

> device, but the weapon as manufactured and sold included such a device; (3) such a device is not possessed but is available in the ordinary channels of commerce; (4) such a device is not available but someone on the planet has made at least one; or (5) no such device has ever been made, but would fit the weapon if it existed and was possessed by the owner.

The plaintiffs argue that they could only comply with the statute if it made clear which of these five interpretations is correct.

A. Ripeness Doctrine

When citizens cannot determine what conduct a law proscribes, the law's vagueness may raise constitutional due process concerns. "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." United States v. Harriss, 347 U.S. 612, 617, 98 L. Ed. 989, 74 S. Ct. 808 (1954). The principle underlying the doctrine is that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." Id.

Alleging that the Act is unconstitutionally vague, the plaintiffs complain about the threat of enforcement, but not any particular instances of enforcement. Such facial challenges raise special justiciability concerns. Particularly relevant here is the doctrine of ripeness, which "asks whether an injury that has not yet happened is sufficiently likely to happen" to warrant judicial review. 13A Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure, § 3531.12, at 50 (2d ed. 1984) (citing Warth v. Seldin, 422 U.S. 490, 499 n.10, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975) (defining ripeness inquiry as "whether the harm asserted has matured sufficiently

to warrant judicial intervention.")). The requirement of ripeness is "particularly relevant in the context of actions for preenforcement review of statutes," because it "focuses on the timing of the action." Navegar, Inc. v. United States, 322 U.S. App. D.C. 288, 103 F.3d 994, 998 (D.C. Cir. 1997).

In determining ripeness, we apply a familiar test: "'the question in each case is whether . . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" Lake Carriers' Assn. v. MacMullan, 406 U.S. 498, 506, 32 L. Ed. 2d 257, 92 S. Ct. 1749 (1972) (quoting Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 85 L. Ed. 826, 61 S. Ct. 510 (1941)). There are several important reasons for a court to exercise the "passive virtue"[3] of waiting for a controversy to mature before passing judgment on the merits:

> [C]ourts should not render decisions absent a genuine need to resolve a real dispute. Unnecessary decisions dissipate judicial energies better conserved for litigants who have a real need for official assistance. . . . Defendants, moreover, should not be forced to bear the burdens of litigation without substantial justification, and in any event may find themselves unable to litigate intelligently if they are forced to grapple with hypothetical possibilities rather than immediate facts.

Wright, Miller, and Cooper, § 3532.1, at 114-5; see also United States v. Hilton, 167 F.3d 61 (1st Cir. 1999) (declining to entertain overbreadth challenge to the Child Online Privacy

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[3] See Alexander Bickel, The Least Dangerous Branch 111 (1962).

Protection Act for similar reasons). These concerns often militate against preenforcement review.

Nevertheless, threats of enforcement of a vague statute can support a facial challenge to a statute when certain conditions are met. "'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.'" Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 60 L. Ed. 2d 895, 99 S. Ct. 2301 (1979) (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593, 67 L. Ed. 1117, 43 S. Ct. 658 (1923)); see also Wright, Miller & Cooper, § 3532.5, at 183 (explaining that the opportunity to offer a constitutional defense at a criminal proceeding "simply is not an adequate remedy."). To determine whether the threat of enforcement of an allegedly vague statute is ripe for judicial review, we examine "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs. v. Gardner, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). "Fitness typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed, whereas hardship typically turns upon whether the challenged action creates a direct and immediate dilemma for the parties." Rhode Island Ass'n of Realtors, Inc., v. Whitehouse, 199 F.3d 26, 33 (1st Cir. 1999) (internal quotation marks omitted). We turn to these hardship and fitness considerations.

1. Hardship

In all of the vagueness counts, the main hardship alleged by the plaintiffs is the threat of prosecution. A threatened prosecution is only immediate enough to satisfy the hardship prong of the ripeness inquiry when "the challenged action

creates a 'direct and immediate' dilemma for the parties." W.R. Grace & Co. v. United States Envtl. Prot. Agency, 959 F.2d 360, 364 (1st Cir., 1992) (quoting Abbott Labs., 387 U.S. at 152 (1967)). Such a dilemma exists when threatened prosecution puts the party seeking preenforcement review "between a rock and a hard place--absent the availability of preenforcement review, she must either forego possibly lawful activity because of her well-founded fear of prosecution, or willfully violate the statute, thereby subjecting herself to criminal prosecution and punishment." Navegar, 103 F.3d at 998 (citing Babbitt, 442 U.S. at 298-99). The plaintiffs allege that they face such a dilemma because they must choose between costly compliance (giving up possession of all guns that might be large capacity weapons) or risky noncompliance (keeping their guns and worrying about prosecution for possessing large capacity weapons).

That argument might have some force if the Act banned large capacity weapons outright instead of licensing them. For example, in Peoples Rights Organization, Inc. v. City of Columbus, 152 F.3d 522 (6th Cir. 1998), where the plaintiffs challenged successfully on vagueness grounds a municipal ordinance banning assault weapons, the preenforcement challenge was ripe for review because the law presented those plaintiffs with a "Hobson's choice[:] they [could] either possess their firearms in Columbus and risk prosecution under the City's law, or, alternatively, they [could] store their weapons outside the City, depriving themselves of the use and possession of the weapons."[4] People's Rights Org., 152 F.3d at 529 (holding that

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[4] In Nat'l Rifle Assoc. v. Magaw, 132 F.3d 272 (6th Cir. 1997) the same court ruled that the facial challenge of certain gun manufacturers to the federal Crime Control Act of 1994 was ripe because of the economic harms suffered by businesses

city ordinance's ban on assault weapons was vague because the ordinance lacked a scienter requirement and its definitions of assault weapons, inter alia, unfairly required gun consumers to ascertain the developmental history of particular weapons or monitor the precise types of ammunition available for their weapons). Here, the plaintiffs have a third option: obtaining a license for their weapons.[5]

Confronted with this licensing argument, the plaintiffs respond that they do not know whether they need a license. However, we have long held that all owners of firearms are on notice that they are subject to regulation, including licensing. See United States v. DeBartolo, 482 F.2d 312, 316 (1st Cir. 1973) (internal quotation marks omitted) (rejecting a gun transferor's due process challenge to a conviction for

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which sold guns. Like the Columbus ordinance, the Crime Control Act also lacked a licensing scheme, making Magaw distinguishable for the same reasons.

[5] The plaintiffs cite only one case in which a facial challenge to a state licensing scheme for guns has been held ripe. Coalition of New Jersey Sportsmen, Inc. v. Whitman, 44 F. Supp. 2d 666, 673 n.10 (D.N.J. 1999). Although this case ultimately repudiated the type of challenge they propose here, the plaintiffs rely upon it because of its justiciability holding. Again, the case is distinguishable. The New Jersey law examined in Coalition was effectively a ban on assault weapons. As an earlier decision evaluating the New Jersey law stated, "the prohibition is de facto [because of the] . . . . extremely rigorous qualification process required for receiving a license." Coalition of New Jersey Sportsmen v. Florio, 744 F. Supp. 602, 608 (D.N.J. 1990). The plaintiffs have never alleged that the Massachusetts licensing process amounts to a de facto ban.

transferring a gun without a license because "where, as here . . . dangerous or deleterious devices . . . are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation"). Here, the regulation of large capacity weapons provides a process for resolving uncertainty about the scope of the regulation--the application for a license. The hardship alleged by the plaintiffs--being forced to dispose of possibly lawful weapons or risking prosecution under the statute--dissolves in light of that licensing option.

2. Fitness

The fitness component of ripeness addresses whether the factual and legal dimensions of the challenge to the Act are developed enough to permit adjudication of the plaintiffs' claim. The Act empowers an agency of the Commonwealth--the Executive Office of Public Safety ("EOPS")--to promulgate regulations clarifying its meaning and to publish a list of weapons proscribed by the statute. Mass. Gen. Laws ch. 140, § 131 3/4. The statute charges the EOPS to publicize these clarifications widely:

> The secretary shall, not less than three times annually, publish the roster in newspapers of general circulation throughout the commonwealth, and shall send a copy thereof to all dealers licensed in the commonwealth under the provisions of said section 122 of said chapter 140; and further, the licensing authority shall furnish said roster to all cardholders and licensees upon initial issuance and upon every renewal of the same.

Id.

The statute also provides for citizen input into the

process of promulgating and updating the roster: "The secretary may amend the roster upon his own initiative or with the advice of [the Gun Control Advisory Board]. A person may petition the secretary to place a weapon on, or remove a weapon from, the roster, subject to the provisions of this section." Id. The Gun Control Advisory board, appointed by the Governor, has seven members, "one of whom shall be a member of the Gun Owners Action League." Mass. Gen. Laws ch. 140, § 131 1/2 . Thus, one of the members of the board must be a representative from the lead associational plaintiff in this case, GOAL. Id.

Both the clarifying language and the roster assist law enforcement officers and laymen in interpreting the statute. For example, the plaintiffs complain that the term "'capable of accepting' does not inform the owner whether she must actually possess the feeding device, or whether the manufacture, somewhere in the world, of some feeding device that her gun is capable of accepting" would suddenly render the gun a large capacity weapon (and thus require its owner to obtain a Class A license). The clarifying language issued with the roster addresses this question:

> "Capable of accepting" shall mean any firearm, rifle or shotgun in which a large capacity feeding device is capable of being used without alteration of the weapon; provided, however, that said large capacity feeding device is fully or partially inserted into the weapon or attached thereto, or is under the direct control of a person who also has direct control of a weapon capable of accepting said feeding device.

Executive Office of Public Safety, Large Capacity Weapon Roster Effective February 15, 2002, available at http://www.state.ma.us/chsb/download/frb/largecap2002.pdf.

Similar administrative clarifications may well answer other questions raised by the plaintiffs. Observing a similar clarification process on the federal level, the Sixth Circuit in Magaw, 132 F.3d 272 (6th Cir. 1997), refused to review a statute (18 U.S.C. § 926) similar to the Massachusetts law challenged by the plaintiffs, in part because the plaintiffs there had not given the relevant rulemaking authority a chance to clarify the statute:

> [T]he Crime Control Act delegates rulemaking authority to the Secretary of the Treasury. The Secretary, in turn, has delegated that authority to the BATF, which has the authority to make rules designating in greater specificity the requirements of the statute . . . . We believe a federal court should not intervene and determine whether a statute enacted by Congress is unconstitutionally vague on its face before the agency with rulemaking authority has had an opportunity to interpret the statute.

Id. at 292. This reasoning applies to the Act as well. The process of administrative clarification, begun even before the Act took effect, has continued during the pendency of this litigation.[6] We see no basis for precluding future good faith

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[6] According to the statute, the "secretary may amend the roster upon his own initiative or with the advice of [the Gun Control Advisory] board. A person may petition the secretary to place a weapon on, or remove a weapon from, the roster." Mass. Gen. Laws ch. 140, § 131 3/4. The secretary issued an updated version of the roster as recently as February 15, 2002. See Executive Office of Public Safety, Large Capacity Weapon Roster Effective February 15, 2002, available at http://www.state.ma.us/chsb/download/frb/largecap2002.pdf.

efforts by professionals in the Executive Office of Public Safety to clarify the statute.

In summary, the opportunity for licensing minimizes the alleged hardship, and the continuing administrative clarification of the Act reduces uncertainty. Neither Count Four nor Count Six is ripe for review.

B. Prohibitions on "Furnishing a Weapon" to a Minor (Count 10)

Count Ten of the plaintiffs' complaint (alleging that the statutory ban on "furnishing" weapons to a minor is unconstitutionally vague) is also unripe. Massachusetts law has banned the furnishing of weapons to minors for many years. See, e.g., 1884 Mass. Acts 76. Before the Act, the statute banned the furnishing of rifles or shotguns to minors, and set the penalty for "furnishing" such weapons to minors and aliens between $ 500 and $ 1,000 (with no provisions for imprisonment). Mass. Gen. Laws ch. 140, § 130 (1997). The Act updated this statutory language to reflect the new three-tier classifications of weapons and increased the penalties for violation:

> Whoever . . . sells or furnishes any alien or any person under eighteen years of age a rifle, shotgun, machine gun or ammunition, or whoever sells or furnishes to any person under 21 years of age a firearm or large capacity rifle or shotgun or ammunition therefor shall have his license to sell . . . revoked . . . and shall be punished by a fine of not less than $ 1,000 nor more than $ 10,000, or by imprisonment in a state prison for not more than ten years or by imprisonment in a house of correction for not more than two and one-half years, or by both such fine and imprisonment.

Mass. Gen. Laws ch. 140, § 130. As it did before the Act, the statute also provides several exceptions for parents and shooting instructors.[7]

In their challenge to Count Ten, the plaintiffs re-allege the vagueness of the term "large capacity weapon." We have already explained why this challenge is unripe for review. To the extent that the plaintiffs' vagueness challenge in Count Ten depends on other arguments, they spend less than one page of a fixty-six page brief developing them. There they only allege that "due to the vagueness of 'furnishes,' they must either risk prosecution or discontinue teaching marksmanship and safety to the youngsters." They do not explain why "furnishes" is vague, or suggest the different meanings it might have. Their reply brief is also unhelpful on this issue. These additional furnishing arguments on vagueness grounds are developed so perfunctorily that we deem them waived. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed

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[7] "Nothing in this section . . . shall be construed to prohibit a parent or guardian from allowing his child or ward, who has not attained age fifteen, the supervised use of a rifle or shotgun or ammunition therefor . . . nor from furnishing such child or ward, who has attained age fifteen, with a rifle or shotgun that is not a large capacity weapon or ammunition; provided, however, that said child or ward, being fifteen years of age or older, has been issued a valid firearm identification card . . . . Nothing in this section shall be construed to prohibit an instructor from furnishing rifles or shotguns or ammunition therefor to pupils; provided, however, that said instructor has the consent of a parent or guardian of a pupil under the age of eighteen years." Mass. Gen. Laws ch. 140, § 130.

argumentation, are deemed waived.").

The plaintiffs also argue that the furnishing provision violates equal protection because it allows instructors, but not parents, to furnish one under 21 years of age "with a large capacity rifle or shotgun or ammunition therefor," and "no rational relation to any legitimate purpose has been suggested for this discrimination against parents and in favor of instructors." This argument ignores a basic difference between parents and instructors: the latter are subject to detailed training and licensing requirements. Mass. Gen. Laws ch. 140, § 131P. Admittedly, the statute is silent on whether the instructor must supervise the minors after he or she has furnished them with weapons. Nevertheless, the Commonwealth's classification here--permitting instructors, but not parents, to furnish a large capacity weapon to a minor--meets the rational basis test.

III. Freedom of Expression

The plaintiffs allege that one provision in the Act unconstitutionally restricts their freedom of expression. According to the statute, gun clubs with Class A licenses "shall not permit shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof, except by public safety personnel performing in line with their official duties." Mass. Gen. Laws ch. 140, § 131(a). The plaintiffs argue that the law "censors images printed on targets . . . for the first time in world history. " One plaintiff, Outdoor Message, Inc., distributes a target with the image of Adolph Hitler on its front, and an account of Hitler's restrictions on firearm use on the back. Those who buy the target shoot at the image of Hitler in order to express their opposition to tyranny and restrictions on gun use, and other political messages.

First Amendment challenges to proscribed conduct

usually require a two-step inquiry; first, assessing whether the proscribed conduct is sufficiently communicative to count as expression protected by the First Amendment, and secondly, whether the challenged law is content-neutral or content-based. However, a court may sometimes bracket the initial analysis, assume arguendo that the conduct is expressive enough to come within the ambit of First Amendment protection, and then complete the second inquiry. For example, in the Supreme Court's seminal treatment of the speech/conduct distinction, the Court decided to "assume for the sake of argument that 'the alleged communicative element in O'Brien's conduct [was] sufficient to bring into play the First Amendment.'" Bartnicki v. Vopper, 200 F.3d 109, 119 (3rd Cir. 1999) (quoting U.S. v. O'Brien, 391 U.S. 367, 376, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968) (upholding the defendant's criminal punishment for burning his draft card)); see also AIDS Action Committee, Inc. v. Massachusetts Bay Transp. Auth., 42 F.3d 1, 10 (1st Cir. 1994) (assuming "arguendo that the MBTA has correctly characterized the AAC ads as sexually explicit and/or patently offensive, that it has excluded them pursuant to its written Policy, and that it may constitutionally proscribe sexually explicit and/or patently offensive speech in its cars" in order to "decide whether the content discrimination inherent in the MBTA's decision to run the 'Fatal Instinct' ads, while not running the AAC ads, is permissible").

No court has recognized target shooting as a constitutionally protected form of expression. The plaintiffs argue that they are engaged in "expressive conduct," like the flag-burning protected by the Supreme Court in Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989). Such conduct is entitled to First Amendment protection when it evinces "an intent to convey a particularized message . . . [and] the likelihood [is] great that the message would be understood by those who viewed it." Id. at 404 (1989) (internal

quotation marks omitted). In response to this argument, we follow the lead of O'Brien and AIDS Action Committee, assuming for the purpose of the content-neutral/content-based analysis that the target shooting at human figures described by the defendants is expressive conduct entitled to some degree of First Amendment protection.

"The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989). Here, the defendants assert that the Act's purpose was to stop target practice that arguably increases the practicer's capacity to shoot human beings, not to prevent the potentially expressive conduct engaged in by some of the plaintiffs.

The plaintiffs argue that the government's expressed interest in preventing gun fatalities is pretextual because the Act "does not ban shooting at all targets, but only at targets printed with disfavored images." The disfavored images here are images of humans, or targets shaped like humans. There is an obvious connection between the Commonwealth's interest in preventing gun fatalities and its decision to restrict the shooting practices of certain gun clubs. A person who has practiced shooting at a human-shaped target will likely be more proficient at shooting humans than a person who has had to practice at a circular target. This rationale is a believable, reasonable, content-neutral justification for the provision.

The plaintiffs complain that they are specially burdened because they are not allowed to shoot at pictures of tyrants. However, supporters of tyrants are affected in the same way by the statute: they cannot shoot at images of advocates of freedom. The restriction is content-neutral, neither advancing

nor impeding any particular viewpoints, but simply regulating a particular mode of potentially expressive conduct (target shooting) at a particular place (Class A-licensed gun clubs). Of course, the restriction is more likely to burden expressive conduct by those who shoot at targets because such individuals are far more likely to shoot at effigies or images on targets as a form of expression. Nevertheless, this law, "designed to serve purposes unrelated to the content of protected speech [should be] deemed content-neutral even if, incidentally, it has an adverse effect on certain messages while leaving others untouched." McGuire v. Reilly, 260 F.3d 36, 43 (1st Cir. 2001). As in O'Brien, "'the governmental interest is unrelated to the suppression of free expression.'" Johnson, 491 U.S. at 406 (quoting O'Brien, 391 U.S. at 377.). Therefore, the restriction here is content-neutral.

Since this restriction on the time, place, and manner of expressive conduct is content-neutral, it "triggers an intermediate type of scrutiny . . . [and] will be upheld as long as [it is] 'narrowly tailored to serve a significant governmental interest, and allows for reasonable alternative channels of communication.'" Knights of Columbus v. Town of Lexington, 272 F.3d 25, 31 (1st Cir. 2001) (quoting Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 186 (1st Cir. 1996)); see also Ward, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984). The restriction does serve a "significant governmental interest." Knights of Columbus, 272 F.3d at 31. It aims to prevent those who do not have a license for using large capacity weapons from refining their skills with such weapons by shooting at targets depicting humans. The state has a particular interest in preventing those unlicensed to use large capacity weapons from becoming proficient at shooting humans

with such weapons.[8]

The restriction on shooting at targets depicting human figures is also narrowly tailored. As the defendants observe in their brief, the restriction "applies only in Class A licensed clubs because those are the only places where a person who does not have a license for large capacity weapons may shoot such weapons."

The restriction challenged here "allows for reasonable alternative channels of communication." Whatever messages the appellants seek to express by shooting at human images on targets, those messages may be spread via writing, the Internet, word of mouth, or other communication technologies. Similarly, if the destruction of an image of Hitler is the "communication" at issue, they have reasonable alternative channels for defacing that image, by hand or other physical means. If the appellants'

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[8] The state's interest in regulating Class A licensed clubs also answers the plaintiffs' equal protection challenge to this restriction on human target shooting. The plaintiffs argue that "the provision . . . denies the equal protection of the laws, in violation of the Fourteenth Amendment, by treating persons who are in identical circumstances dissimilarly. Everyone else in the Commonwealth is entitled to shoot at such images except those shooting at a club with a Class A license." However, the Equal Protection Clause of the Fourteenth Amendment "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." Vacco v. Quill, 521 U.S. 793, 799, 138 L. Ed. 2d 834, 117 S. Ct. 2293 (1997) (citations omitted). Given that only Class A clubs can permit persons generally unauthorized to use large capacity weapons to use such weapons on their premises, it is reasonable that the state's restriction on shooting at human-shaped targets only applies to them.

message can be conveyed only by shooting at such images, the statute still "leaves open ample alternative channels" for disseminating it: they may shoot at such images at any place where they can lawfully shoot at targets, other than gun clubs with a Class A license.

In summary, the Act's provisions on target shooting comply with all constitutional requirements for content-neutral restrictions on speech, and hence pass intermediate scrutiny.

IV. Equal Protection Challenge to Class A Licensing Provisions

Like individuals, certain clubs and facilities may possess, store, and use large capacity weapons if they successfully apply for a Class A license. Mass. Gen. Laws ch. 140, § 131(a).[9] A

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[9] The statute reads as follows:

> The colonel of state police may, after an investigation, grant a Class A license to a club or facility with an on-site shooting range or gallery, which club is incorporated under the laws of the commonwealth for the possession, storage and use of large capacity weapons, ammunition therefor and large capacity feeding devices for use with such weapons on the premises of such club; provided, however, that not less than one shareholder of such club shall be qualified and suitable to be issued such license; and provided further, that such large capacity weapons and ammunition feeding devices may be used under such Class A club license only by such members that possess a valid firearm identification card issued under section 129B or a valid Class A or Class B license to carry firearms, or

club or facility with a Class A license may permit its members to use its large capacity weapons, even if those members do not individually have Class A licenses, if they have a Class B license or an FID card. Id. A Class A licensed club or facility may also permit non-members to use its large capacity weapons (as long as the non-member uses the large capacity weapon under the supervision of a properly licensed club member or a certified firearms instructor). Id.

Clubs and facilities which want to possess and store large capacity weapons must apply to the Colonel of the State Police in order to obtain a Class A license. Id. According to the statute, "the colonel of state police may, after an investigation, grant a Class A license to a club or facility with an on-site shooting range or gallery . . . provided, however, that not less than one shareholder of such club shall be qualified and suitable to be issued such license." Id. The term "shareholder" here denotes three distinct requirements for clubs or facilities which seek to obtain a Class A license. First, they must be incorporated. Second, they must be corporations with at least

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by such other persons that the club permits while under the direct supervision of a certified firearms safety instructor or club member who, in the case of a large capacity firearm, possesses a valid Class A license to carry firearms or, in the case of a large capacity rifle or shotgun, possesses a valid Class A or Class B license to carry firearms. Such club shall not permit shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof, except by public safety personnel performing in line with their official duties.

Mass. Gen. Laws ch. 140, § 131(a).

one shareholder. Third, at least one shareholder in such corporations must hold individually a Class A license.

According to the appellants, these requirements violate equal protection standards by irrationally discriminating against unincorporated gun clubs and facilities, and those incorporated gun clubs and facilities without any shareholders. Noting that equal protection requires the government to afford similar treatment to similarly situated persons, the plaintiffs observe that "almost all gun clubs are membership corporations without shareholders," and that several named plaintiffs belong to gun clubs which "meet every requirement of the Act for the license except that they do not have shareholders." They also argue that, within clubs with at least one shareholder, a person other than a shareholder should be eligible to fulfill the requirement that at least one person within the club "shall be qualified and suitable to be issued a Class A License."

A. Applicable Legal Standards

The challenged classification is "subject only to . . . rational basis review . . . . In this subset of concerns, the Equal Protection Clause requires 'that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation.'" Mills v. Maine, 118 F.3d 37, 46-47 (1st Cir. 1997) (quoting Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112, 93 L. Ed. 533, 69 S. Ct. 463 (1949) (Jackson, J., concurring)). A statute passes the rational basis test "'if any reasonably conceivable set of facts could establish a rational relationship between [it] and the . . . government's legitimate ends.'" Montalvo-Huertas v. Rivera-Cruz, 885 F.2d 971, 978 (1st Cir. 1989) (quoting Tenoco Oil Co., Inc. v. Dep't of Consumer Affairs, 876 F.2d 1013, 1021 (1st Cir. 1989)). We

need not inquire into the precise rationale of the legislature in enacting the statute. Indeed, "because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." FCC v. Beach Communications, Inc., 508 U.S. 307, 315, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993).

Rational basis review does not permit courts to pass judgment on the effectiveness of the legislature's proposed classifications. "These restraints on judicial review have added force [when the legislature is] . . . defining the class of persons subject to a regulatory requirement." Id. at 316 (1993). This process "'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.'" Id. at 315-316 (quoting United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 179, 66 L. Ed. 2d 368, 101 S. Ct. 453 (1980)). Legislators may enact complex compromises when addressing novel social and economic issues, and "it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement." Williamson v. Lee Optical Co., 348 U.S. 483, 487, 99 L. Ed. 563, 75 S. Ct. 461 (1955). Cognizant of these strictures on rational basis review, we address each of the plaintiffs' equal protection challenges to this portion of the statute.

B. The Incorporation Requirement

Incorporated entities are subject to different liability standards and types of regulation than unincorporated entities. As the defendants argue in their brief, "the Legislature could . . . have concluded that the differences in scope of liability might

make it easier for corporations to obtain insurance against the risk of injury on premises." Given that the Secretary of State and the Attorney General regulate corporations, the legislature may also have concluded that an incorporated gun club or shooting facility is more likely to prevent the misuse of large capacity weapons than an unincorporated association. Many federal and state laws legitimately treat corporations differently than non-corporations. See, e.g., Town of Brookline v. Gorsuch, 667 F.2d 215, 221 n.4 (1st Cir. 1981) (focusing on the federal tax code); Semler v. Oregon State Bd. of Dental Exam'rs, 294 U.S. 608, 611, 79 L. Ed. 1086, 55 S. Ct. 570 (1935) (denying corporations the right to practice dentistry). The different treatment here easily meets the rational basis test.

C. Requirement that Class A Licensed Corporations Have at Least one Shareholder

Reflecting its preference for limiting Class A club or facility licenses to entities that are subject to more formal legal requirements, the legislature may have also concluded that extant state law regulated the activities of stock corporations and their shareholders more comprehensively than it regulated non-stock corporations and their members. "Every state['s] statute[s include] detailed provisions on the legal relations of shareholders toward each other and the corporation." James D. Cox, Thomas Lee Hazen, & F. Hodge O'Neal, Corporations § 1.5, at 1.15 (1999 Supp.). We find nothing irrational in the legislative judgment that such detailed provisions increase the likelihood that these stock corporations with Class A licenses will be more responsible in their use of large capacity weapons.

D. Requirement that a Shareholder "shall be qualified and suitable to be issued a Class A License"

The legislature may have concluded that shareholders

have a greater stake in the affairs of a corporation than non-shareholders. Since the legislature was willing to permit non-members of Class A licensed clubs to use large capacity weapons on the premises of a club under the supervision of a club member who holds a Class A license, irrespective of whether those non-members hold a license to use a large capacity weapon, the legislature may have further concluded that its concern for the responsible use of large capacity weapons at a Class A licensed gun club would be advanced if at least one of the potentially supervising club members was also a shareholder in the corporation. Although plaintiffs express considerable skepticism about the rationality of this shareholder requirement, we cannot say that the legislative requirement is irrational. In the realm of social and economic regulation, a classification passes the rational basis test "'if any reasonably conceivable set of facts could establish a rational relationship between [it] and the . . . government's legitimate ends.'" Montalvo-Huertas, 885 F.2d at 978 (quoting Tenoco Oil Co., Inc. v. Dep't of Consumer Affairs, 876 F.2d 1013, 1021 (1st Cir. 1989)). We find such a rational relationship between the shareholder requirement and the Commonwealth's evident purpose to maximize the responsible use of large capacity weapons on the premises of gun clubs with Class A licenses.

V. Freedom of Association Challenge to Class A Licensing Provisions

Relying on the Supreme Court's recent decision in Boy Scouts of America v. Dale, 530 U.S. 640 (2000), the plaintiffs also allege that the restriction of Class A licenses to incorporated gun clubs with at least one shareholder forces them to associate with members of such clubs, in violation of their associational rights under the First Amendment. The plaintiffs insist that "freedom of association . . . plainly presupposes a freedom not to associate." Id. at 648 (internal

quotation marks omitted).

Dale is inapplicable here. In that case, the state of New Jersey required the Boy Scouts to accept gay Scout leaders, which "would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." Id. at 653. In this case the Commonwealth is only imposing a procedural, formal requirement on the structure of an organization. The statute neither requires nor even suggests any forced association of gun owners with anyone of differing views.

Furthermore, as the Commonwealth points out, requiring a club to obtain a license in order to enjoy a narrow range of privileges relating to large capacity weapons does not "implicate any constitutionally protected right of association because it does not involve . . . protected associative activity." Like an ordinance restricting attendance at certain dance halls to persons of a certain age, this regulation simply does not implicate the First Amendment. See City of Dallas v. Stanglin, 490 U.S. 19, 24, 104 L. Ed. 2d 18, 109 S. Ct. 1591 (1989) (holding that the dancing regulated by the municipal ordinance "simply [does] not involve the sort of expressive association that the First Amendment has been held to protect"). The plaintiffs are not being forced to join any association that espouses a political viewpoint, and are not required to permit persons whose viewpoints they find objectionable to join their own association. Therefore, their First Amendment challenge to the Class A licensing provisions is meritless.

VI. Conclusion

Like many citizens trying to comply with a complex regulatory scheme, the plaintiffs here describe difficulties in

understanding the Act. Without minimizing their concerns, we conclude that this preenforcement challenge to the Act is not ripe for review for all of the reasons stated. Although justiciable, their varied First Amendment and Equal Protection challenges are meritless. We therefore affirm the decision of the district court.

So ordered. Each side shall bear its own costs.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 00-2357

GUN OWNERS' ACTION LEAGUE, INC.; OUTDOOR MESSAGE
COOPERATIVE, INC.; MASSACHUSETTS SPORTSMEN'S JUNIOR
CONSERVATION CAMP INC.; A.G. GUNS & AMMO, INC.; MARK DAVID
COHEN; JOHN DOE II; JAMES F. GETTENS; DANA H. CROWE; LORI
CROWE; BRIAN E. DUNN; JOHN P. HEARSON; TOM LAROCHE; ANN D.
LAROCHE; ROBERT L. WALTER; JOHN DOE I; GOAL FOUNDATION, INC.,

Plaintiffs - Appellants

v.

JANE SWIFT, Acting Governor, Commonwealth of Massachusetts;
THOMAS F. REILLY, Attorney General, Commonwealth of Massachusetts;
JOHN DIFAVA, Colonel, Massachusetts State Police;
MARTHA COAKLEY,
EDWARD DAVIS, Superintendent, Police Department, Lowell, MA,

Defendants - Appellees

JUDGMENT

Entered: March 25, 2002

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argues by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. Each side shall bear its own costs.

By:

The Court:

Richard Cushing Donovan, Clerk

By:
Janice M. O'Neil

Chief Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 98-12125-GAO

GUN OWNERS' ACTION LEAGUE, INC.;
OUTDOOR MESSAGE COOPERATIVE, INC.;
MASSACHUSETTS SPORTSMEN'S JUNIOR
CONSERVATION CAMP INC.;
A.G. GUNS & AMMO, INC.; GEORGE A. DANAS;
MARK COHEN;
JOHN DOE II; JAMES F. GETTENS; DANA H. CROWE;
LORI CROWE;
BRIAN E. DUNN; JOHN P. HEARSON; TOM LAROCHE;
ANN D. LAROCHE;
ROBERT L. WALTER; JOHN DOE I; GOAL
FOUNDATION, INC.,
Plaintiffs,

v.

ARGEO PAUL CELLUCCI, Acting Governor of
Massachusetts;
THOMAS F. REILLY, Attorney General, Commonwealth
of Massachusetts;
REED V. HILLMAN, Colonel, Massachusetts State Police;
MARTHA COAKLEY, District Attorney, Middlesex
County, MA;
EDWARD DAVIS, Superintendent, Police Department,
Lowell, MA,
Defendants

MEMORANDUM and ORDER
September 28, 2000

O'TOOLE, D.J.

The plaintiffs brought suit challenging the Massachusetts Gun Control Act of 1998, St. 1998, Ch. 180 (the "Act"), on a variety of grounds. The defendants have moved to dismiss the complaint for failure to state claims upon which relief can be granted. After consideration of the parties' submissions and oral arguments, I am satisfied that the motion to dismiss ought to be granted essentially for the reasons advanced by the defendants in their papers.

The plaintiffs seek to invoke various constitutional provisions in their scattershot attack on the statute. Counts One, Two, and Three rely chiefly on First Amendment doctrines, but none of these counts alleges a viable constitutional claim. The Act's regulation of shooting at targets shaped like human beings addresses conduct, not expression. See United State v. O'Brien, 391 U.S. 367 (1967). The classification of certain named weapons as assault weapons does not infringe free speech; even if it did, none of the plaintiffs has standing to bring the claim. Restricting Class A gun club licenses to clubs organized as stock corporations offends neither the First Amendment's guarantee of freedom of association nor the Equal Protection Clause of the Fourteenth Amendment, for the reasons the defendants have pointed out.

The plaintiffs also argue, in Counts Four, Five, and Six, that certain defined terms are unconstitutionally vague, including the terms "large-capacity weapons," "assault weapon," and "large capacity feeding device." They further contended in Count Ten that the prohibition against "furnishing" certain arms to persons under age 21 is too vague. None of these claims is ripe as to any of the plaintiffs. See, e.g., National Rifle Ass'n v. Magaw, 132 F.3d 272, 284-90 (6th Cir. 1997); Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997). Even if the

claims were ripe for adjudication, the vagueness challenge is not meritorious. First, the definitions for the purpose of the Act's licensing requirements do not regulate or limit constitutionally protected conduct. Notably, the plaintiffs do not allege infringement of any interest putatively protected by the Second Amendment. Moreover, it is patently apparent that the definitions, even if they might be unclear at the margins, are not impermissibly vague in all applications, especially in light of the amendments to the Act which addressed some of the potential uncertainty. See Village of Hoffman Estates v. The Flipside, Hoffman Estates, 455 U.S. 489, 494-95 (1982).

The Eleventh Amendment bars this Court from considering the claim in Count Seven that the Act violated the Massachusetts Constitution.[1] Similarly, even if there had been an impermissible delegation of authority by the state legislature to an administrative agency, as the plaintiffs allefe in Count Eight, no federal due process right is implicated. Finally, there is no equal protection violation from an "underinclusive" prohibitions cited in Count Nine.

The defendants' motion to dismiss is GRANTED, and the complain is DISMISSED.

It is SO ORDERED.

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[1] The plaintiffs correctly assert that the Eleventh Amendment does not extend immunity to municipal officials, such as District Attorney Coakley or Police Superintendent Davis. Count Seven of the complaint alleges an impermissible delegation of legislative and judicial power under the Massachusetts Constitution; it does not allege a cause of action against either the district attorney or the police superintendent.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Gun Owner's Action League, Inc., Et Al.

Civil Action No. 98-CV-12125

v.

Argeo Paul Cellucci, Acting Governor of Massachusetts; Et Al.

ORDER OF DISMISSAL

O'Toole, D.J.

In accordance with this Court's Memorandum and Order dated 9/28/00, #33, and the plaintiff not having shown good cause why this case should not be dismissed pursuant to 28 U.S.C. §1915(e)(2), it is ORDERED that the within action be and it is hereby dismissed.

By the Court

Deputy Clerk

Date September 28, 2000

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS GENERAL LAWS[1]

CHAPTER 140

§ 121. Definitions; Application for License or Identification Card; Exceptions.

As used in sections 122 to 131P, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings:--

* * *

"Large capacity feeding device", (i) a fixed or detachable magazine, box, drum, feed strip or similar device capable of accepting, or that can be readily converted to accept, more than ten rounds of ammunition or more than five shotgun shells; or (ii) a large capacity ammunition feeding device as defined in the federal Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. section 921(a)(31). The term "large capacity feeding device" shall not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber ammunition.

"Large capacity weapon", any firearm, rifle or shotgun: (i) that is semiautomatic with a fixed large capacity feeding device; (ii) that is semiautomatic and capable of accepting, or readily modifiable to accept, any detachable large capacity feeding device; (iii) that employs a rotating cylinder capable of accepting more than ten rounds of ammunition in a rifle or firearm and more than five shotgun shells in the case of a shotgun or firearm; or (iv) that is an assault weapon. The term "large capacity weapon" shall be a secondary designation and shall apply to a weapon in addition to its primary designation as

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[1] Deletions are indicated by "* * *".

a firearm, rifle or shotgun and shall not include: (i) any weapon that was manufactured in or prior to the year 1899; (ii) any weapon that operates by manual bolt, pump, lever or slide action; (iii) any weapon that is a single-shot weapon; (iv) any weapon that has been modified so as to render it permanently inoperable or otherwise rendered permanently unable to be designated a large capacity weapon; or (v) any weapon that is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and which is not intended for use as a funetional weapon and cannot be readily modified through a combination of available parts into an operable large capacity weapon.

* * *

"Weapon", any rifle, shotgun or firearm.

§ 129B. Firearm Identification Card; Application; Suspension or Revocation; Appeal; Investigation of Criminal Record and Mental Health of Applicant.

* * *

(6) A firearm identification card shall not entitle a holder thereof to possess: (i) a large capacity firearm or large capacity feeding device therefor, except under a Class A license issued to a shooting club as provided under section 131 or under the direct supervision of a holder of a Class A license issued to an individual under section 131 at an incorporated shooting club or licensed shooting range; or (ii) a non-large capacity firearm or large capacity rifle or shotgun or large capacity feeding device therefor, except under a Class A license issued to a shooting club as provided under section 131 or under the direct supervision of a holder of a Class A or Class B license issued to an individual under section 131 at an incorporated shooting club or licensed shooting range. A firearm identification card shall not entitle a holder thereof to possess any rifle or shotgun that is, or in such manner that is, otherwise prohibited by law. A

firearm identification card shall be valid for the purpose of purchasing and possessing chemical mace, pepper spray or other similarly propelled liquid, gas or powder designed to temporarily incapacitate. Except as otherwise provided herein, a firearm identification card shall not be valid for the use, possession, ownership, transfer, purchase, sale, lease, rental or transportation of a rifle or shotgun if such rifle or shotgun is a large capacity weapon as defined in section 121.

* * *

§ 131. License to Carry Firearm; Penalty for Violation.

All licenses to carry firearms shall be designated Class A or Class B, and the issuance and possession of any such license shall be subject to the following conditions and restrictions:

(a) A Class A license shall entitle a holder thereof to purchase, rent, lease, borrow, possess and carry: (i) firearms, including large capacity firearms, and feeding devices and ammunition therefor, for all lawful purposes, subject to such restrictions relative to the possession, use or carrying of firearms as the licensing authority deems proper; and (ii) rifles and shotguns, including large capacity weapons, and feeding devices and ammunition therefor, for all lawful purposes; provided, however, that the licensing authority may impose such restrictions relative to the possession, use or carrying of large capacity rifles and shotguns as it deems proper. A violation of a restriction imposed by the licensing authority under the provisions of this paragraph shall be cause for suspension or revocation and shall, unless otherwise provided, be punished by a fine of not less than $ 1,000 nor more than $ 10,000; provided, however, that the provisions of section 10 of chapter 269 shall not apply to such violation.

The colonel of state police may, after an investigation, grant a Class A license to a club or facility with an on-site shooting range or gallery, which club is incorporated under the laws of the commonwealth for the possession, storage and use of large capacity weapons, ammunition therefor and large capacity feeding devices for use with such weapons on the premises of such club; provided, however, that not less than one shareholder of such club shall be qualified and suitable to be issued such license; and provided further, that such large capacity weapons and ammunition feeding devices may be used under such Class A club license only by such members that possess a valid firearm identification card issued under section 129B or a valid Class A or Class B license to carry firearms, or by such other persons that the club permits while under the direct supervision of a certified firearms safety instructor or club member who, in the case of a large capacity firearm, possesses a valid Class A license to carry firearms or, in the case of a large capacity rifle or shotgun, possesses a valid Class A or Class B license to carry firearms. Such club shall not permit shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof, except by public safety personnel performing in line with their official duties.

No large capacity weapon or large capacity feeding device shall be removed from the premises except for the purposes of: (i) transferring such firearm or feeding device to a licensed dealer; (ii) transporting such firearm or feeding device to a licensed gunsmith for repair; (iii) target, trap or skeet shooting on the premises of another club incorporated under the laws of the commonwealth and for transporting thereto; (iv) attending an exhibition or educational project or event that is sponsored by, conducted under the supervision of or approved by a public law enforcement agency or a nationally or state recognized entity that promotes proficiency in or education about semiautomatic weapons and for transporting thereto and

therefrom; (v) hunting in accordance with the provisions of chapter 131; or (vi) surrendering such firearm or feeding device under the provisions of section 129D. Any large capacity weapon or large capacity feeding device kept on the premises of a lawfully incorporated shooting club shall, when not in use, be secured in a locked container, and shall be unloaded during any lawful transport. The clerk or other corporate officer of such club shall annually file a report with the colonel of state police and the executive director of the criminal history systems board listing all large capacity weapons and large capacity feeding devices owned or possessed under such license. The colonel of state police or his designee, shall have the right to inspect all firearms owned or possessed by such club upon request during regular business hours and said colonel may revoke or suspend a club license for a violation of any provision of this chapter or chapter 269 relative to the ownership, use or possession of large capacity weapons or large capacity feeding devices.

(b) A Class B license shall entitle a holder thereof to purchase, rent, lease, borrow, possess and carry: (i) non-large capacity firearms and feeding devices and ammunition therefor, for all lawful purposes, subject to such restrictions relative to the possession, use or carrying of such firearm as the licensing authority deems proper; provided, however, that a Class B license shall not entitle the holder thereof to carry or possess a loaded firearm in a concealed manner in any public way or place; and provided further, that a Class B license shall not entitle the holder thereof to possess a large capacity firearm, except under a Class A club license issued under this section or under the direct supervision of a holder of a valid Class A license at an incorporated shooting club or licensed shooting range; and (ii) rifles and shotguns, including large capacity rifles and shotguns, and feeding devices and ammunition therefor, for all lawful purposes; provided, however, that the licensing

authority may impose such restrictions relative to the possession, use or carrying of large capacity rifles and shotguns as he deems proper. A violation of a restriction provided under this paragraph, or a restriction imposed by the licensing authority under the provisions of this paragraph, shall be cause for suspension or revocation and shall, unless otherwise provided, be punished by a fine of not less than $ 1,000 nor more than $ 10,000; provided, however, that the provisions of section 10 of chapter 269 shall not apply to such violation.

A Class B license shall not be a valid license for the purpose of complying with any provision under this chapter governing the purchase, sale, lease, rental or transfer of any weapon or ammunition feeding device if such weapon is a large capacity firearm or if such ammunition feeding device is a large capacity feeding device for use with a large capacity firearm, both as defined in section 121.

(c) Either a Class A or Class B license shall be valid for the purpose of owning, possessing, purchasing and transferring non-large capacity rifles and shotguns, and for purchasing and possessing chemical mace, pepper spray or other similarly propelled liquid, gas or powder designed to temporarily incapacitate, consistent with the entitlements conferred by a firearm identification card issued under section 129B.

(d) Any person residing or having a place of business within the jurisdiction of the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to such licensing authority or the colonel of state police, an application for a Class A or Class B license to carry firearms, or renewal of the same, which such licensing authority or said colonel may issue if it appears that the applicant is a suitable person to be issued such license, and that the applicant has good reason to fear injury to his person or

property, or for any other reason, including the carrying of firearms for use in sport or target practice only, subject to such restrictions expressed or authorized under this section, unless the applicant:

(i) has, in any state or federal jurisdiction, been convicted or adjudicated a youthful offender or delinquent child for the commission of (a) a felony; (b) a misdemeanor punishable by imprisonment for more than two years; (c) a violent crime as defined in section 121; (d) a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed; or (e) a violation of any law regulating the use, possession or sale of controlled substances as defined in section 1 of chapter 94C;

(ii) has been confined to any hospital or institution for mental illness, unless the applicant submits with his application an affidavit of a registered physician attesting that such physician is familiar with the applicant's mental illness and that in such physician's opinion the applicant is not disabled by such an illness in a manner that should prevent such applicant from possessing a firearm;

(iii) is or has been under treatment for or confinement for drug addiction or habitual drunkenness, unless such applicant is deemed to be cured of such condition by a licensed physician, and such applicant may make application for such license after the expiration of five years from the date of such confinement or treatment and upon presentment of an affidavit issued by such physician stating that such physician knows the

applicant's history of treatment and that in such physician's opinion the applicant is deemed cured;

(iv) is at the time of the application less than 21 years of age;

(v) is an alien;

(vi) is currently subject to: (A) an order for suspension or surrender issued pursuant to section 3B or 3C of chapter 209A or a similar order issued by another jurisdiction; or (B) a permanent or temporary protection order issued pursuant to chapter 209A or a similar order issued by another jurisdiction; or

(vii) is currently the subject of an outstanding arrest warrant in any state or federal jurisdiction.

(e) Within seven days of the receipt of a completed application for a license to carry or possess firearms, or renewal of same, the licensing authority shall forward one copy of the application and one copy of the applicant's fingerprints to the colonel of state police, who shall within 30 days advise the licensing authority, in writing, of any disqualifying criminal record of the applicant arising from within or without the commonwealth and whether there is reason to believe that the applicant is disqualified for any of the foregoing reasons from possessing a license to carry or possess firearms. In searching for any disqualifying history of the applicant, the colonel shall utilize, or cause to be utilized, files maintained by the department of probation and statewide and nationwide criminal justice, warrant and protection order information systems and files including, but not limited to, the National Instant Criminal Background Check System. The colonel shall inquire of the commissioner of the department of mental health relative to

whether the applicant is disqualified from being so licensed. If the information available to the colonel does not indicate that the possession of a firearm or large capacity firearm by the applicant would be in violation of state or federal law, he shall certify such fact, in writing, to the licensing authority within said 30 day period.

The licensing authority may also make inquiries concerning the applicant to: (i) the executive director of the criminal history systems board relative to any disqualifying condition and records of purchases, sales, rentals, leases and transfers of weapons or ammunition concerning the applicant; (ii) the commissioner of probation relative to any record contained within the department of probation or the statewide domestic violence record keeping system concerning the applicant; and (iii) the commissioner of the department of mental health relative to whether the applicant is a suitable person to possess firearms or is not a suitable person to possess firearms. The director or commissioner to whom the licensing authority makes such inquiry shall provide prompt and full cooperation for that purpose in any investigation of the applicant.

The licensing authority shall, within 40 days from the date of application, either approve the application and issue the license or deny the application and notify the applicant of the reason for such denial in writing; provided, however, that no such license shall be issued unless the colonel has certified, in writing, that the information available to him does not indicate that the possession of a firearm or large capacity firearm by the applicant would be in violation of state or federal law.

* * *

CHAPTER 269

§ 10. Penalty for Unlawfully Carrying Dangerous Weapons, Possessing Machine Gun, etc.

* * *

(m) [Subsection (m) is added.] Notwithstanding the provisions of paragraph (a) or (h), any person not exempted by statute who knowingly has in his possession, or knowingly has under his control in a vehicle, a large capacity weapon or large capacity feeding device therefor who does not possess a valid Class A or Class B license to carry firearms issued under section 131 or 131F of chapter 140, except as permitted or otherwise provided under this section or chapter 140, shall be punished by imprisonment in a state prison for not less than two and one-half years nor more than ten years. The possession of a valid firearm identification card issued under section 129B shall not be a defense for a violation of this subsection; provided, however, that any such person charged with violating this paragraph and holding a valid firearm identification card shall not be subject to any mandatory minimum sentence imposed by this paragraph. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served such minimum term of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of

the court to place certain offenders on probation shall not apply to any person 17 years of age or over charged with a violation of this section.

Supreme Court, U.S.
FILED
JUL 19 2002
OFFICE OF THE CLERK

(2)

NO. 01-1879

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

GUN OWNERS ACTION LEAGUE, INC., ET AL.,
Petitioners,

v.

JANE SWIFT, ACTING GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

STATE RESPONDENTS' BRIEF IN OPPOSITION

THOMAS F. REILLY
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22 pp

Question Presented

Whether a Massachusetts law regulating the ownership and possession of firearms in the state, which includes a provision prohibiting shooting at a target with a human image at certain gun clubs, other than such shooting by public safety personnel, violates the Free Speech Clause of the First Amendment.

List of Parties

All parties to the proceeding are correctly identified in the petition for a writ of certiorari.

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Opinions and Orders Below

The opinion of the First Circuit Court of Appeals is published at 284 F.3d 198 and is reproduced in the appendix to the petition ("Pet. App.") at 1a. The opinion of the District Court, Pet. App. 38a, is unpublished.

Jurisdiction

On March 25, 2002, the First Circuit Court of Appeals rendered judgment affirming the District Court's order dismissing the complaint. Pet. App. 36a. The District Court had jurisdiction under 28 U. S. C. § 1331. This Court has jurisdiction of the petition under 28 U. S. C. § 1254(1).

Constitutional Provision and Statutes Involved

The United States Constitution, Amendment One, provides, in pertinent part:

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

Massachusetts G.L. c. 140, § 131, provides, in pertinent part:

All licenses to carry firearms shall be designated Class A or Class B, and the issuance and possession of any such license shall be subject to the following conditions and restrictions:

(a) A Class A license shall entitle a holder thereof to purchase, rent, lease, borrow, possess and carry:

(i) firearms, including large capacity firearms, and feeding devices and ammunition therefor, for all lawful purposes, subject to such restrictions relative to the possession, use or carrying of firearms

as the licensing authority deems proper; and (ii) rifles and shotguns, including large capacity weapons, and feeding devices and ammunition therefor, for all lawful purposes; provided, however, that the licensing authority may impose such restrictions relative to the possession, use or carrying of large capacity rifles and shotguns as it deems proper. A violation of a restriction imposed by the licensing authority under the provisions of this paragraph shall be cause for suspension or revocation and shall, unless otherwise provided, be punished by a fine of not less than $1,000 nor more than $10,000; provided, however, that the provisions of section 10 of chapter 269 shall not apply to such violation.

The colonel of state police may, after an investigation, grant a Class A license to a club or facility with an on-site shooting range or gallery, which club is incorporated under the laws of the commonwealth for the possession, storage and use of large capacity weapons, ammunition therefor and large capacity feeding devices for use with such weapons on the premises of such club; provided, however, that not less than one shareholder of such club shall be qualified and suitable to be issued such license; and provided further, that such large capacity weapons and ammunition feeding devices may be used under such Class A club license only by such members that possess a valid firearm identification card issued under section 129B or a valid Class A or Class B license to carry firearms, or by such other persons that the club permits while under the direct supervision of a certified firearms safety instructor or club member who, in the case of a large capacity firearm, possesses a valid Class A license to carry firearms or, in the case of a large capacity rifle or shotgun, possesses a valid Class A or Class B license to carry firearms. Such club shall not permit shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof, except by public safety personnel performing in line

with their official duties.

Statement of the Case

Proceedings in the Court Below

This case is a facial challenge to a Massachusetts law entitled, an Act Relative to Gun Control in the Commonwealth, effective October 21, 1998 (the "Act"). In their complaint, petitioners sought declaratory and injunctive relief to declare unconstitutional a significant portion of the Act on the grounds, inter alia, that the Act violates the Due Process Clause, Equal Protection Clause and other federal constitutional provisions.[1] The sole basis for the petition in this Court, however, is the petitioners' claim that the Act's prohibition against shooting a high capacity weapon at a target with a human figure or effigy, in Class A-licensed gun clubs, violates the right to free speech secured by the First Amendment to the United States Constitution. The complaint names as defendants the Acting Governor, the Attorney General, and various law enforcement officials of Massachusetts.[2]

On September 28, 2000, the District Court granted respondents' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6), ruling that the complaint failed to state a claim upon which relief can be

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[1] Petitioners have not pursued their Due Process or Equal Protection claims in this Court and, hence, these claims should be deemed waived. Sup. Ct. R. 14(1)(a).

[2] Pursuant to Sup. Ct. R. 35.3, Thomas Foley, as successor in office to John DiFava as Colonel of the State Police, has been automatically substituted as respondent in this case.

granted. Pet. App. 38a. Specifically, with respect to petitioners' free speech claim, the District Court held that "[t]he Act's regulation of shooting at targets shaped like human beings addresses conduct, not expression," citing this Court's decision in *United States v. O'Brien*, 391 U.S. 367 (1967). Pet. App. 39a. The District Court entered an order of dismissal on the same date. Pet. App. 41a.

Petitioners appealed pursuant to 28 U.S.C. § 1291. On March 25, 2002, the Court of Appeals for the First Circuit issued a decision affirming the District Court. Pet. App. 1a. Noting petitioners' claim that shooting at targets with human images is expressive conduct analogous to the flag-burning this Court considered in *Texas v. Johnson*, 491 U.S. 397 (1989), the First Circuit assumed without deciding that such shooting "is expressive conduct entitled to some degree of First Amendment protection." Pet. Att. 25a. On this assumption, the First Circuit proceeded to consider whether the Massachusetts statute is content-neutral or content-based, applying this Court's holding in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), that the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." The First Circuit held that Massachusetts' rationale for the ban on shooting at targets with human images - that a "person who has practiced shooting at a human-shaped target will likely be more proficient at shooting humans than a person who has had to practice at a circular target"- is "a believable, reasonable, content-neutral justification for the provision." Pet. App. 25a.

Having concluded that the Act is content-neutral, the First Circuit next considered whether it satisfies intermediate scrutiny as being "narrowly tailored to serve a significant governmental interest, and allows for reasonable alternative channels of communication," citing this Court's decisions in *Ward v. Rock Against Racism* and *Clark*

v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). Pet. App. 26a. The First Circuit concluded that the Act serves a significant governmental interest in that it "aims to prevent those who do not have a license for using large capacity weapons from refining their skills with such weapons by shooting at targets depicting humans." Pet. App. 26a. It further concluded that since the restriction applies only in Class A licensed gun clubs, "because those are the only places where a person who does not have a license for large capacity weapons may shoot such weapons," the restriction on shooting at human image-like targets is narrowly tailored. Pet. App. 27a. Finally, the First Circuit found that there are "reasonable alternative channels of communication" for any message petitioners seek to convey by shooting at targets with a human image, including writing, the Internet, word of mouth, other communication technologies, and destruction of images of tyrants "by hand or other physical means" and even by shooting at such images "at any place where they can lawfully shoot at targets, other than gun clubs with a Class A license." Pet. App. 27a-28a. The First Circuit therefore concluded that the Act's provisions restricting target shooting at specific gun clubs "comply with all constitutional requirements for content-neutral restrictions on speech, and hence pass intermediate scrutiny." Pet. App. 28a.

Statement of Facts

Petitioners include, among others, Gun Owners' Action League, Inc. ("GOAL"), which represents both individual gun owners and gun clubs throughout Massachusetts. Petition for a Writ of Certiorari (hereafter "Pet.") at 2-3. The respondents are the Acting Governor, the Attorney General, and the Colonel of the State Police, who collectively enforce the Act in Massachusetts. Respondents

Middlesex County District Attorney and the Lowell Police Chief enforce the Act in localities where several petitioners reside. Id.

Contrary to the petitioners' assertion, the Act does not "radically criminalize previously-lawful conduct." Pet. at 4.[3] Indeed, possession of firearms in Massachusetts has been subject to licensing for nearly a century. Mass. St. 1906, c. 172 (requiring license for carrying a loaded pistol). In essence, the Act changed the previous two-tier licensing system into a three-tier system by adding a separate category for large capacity weapons. Under the prior statutory regime, in order to lawfully possess a firearm, one had to obtain either a license to carry firearms or a firearms identification card. This requirement is retained by the Act. However, the Act now provides for two types of licenses to carry: a Class A license for any type of "large capacity" weapon and a Class B license for a large capacity rifle or shotgun. Mass. G.L. c. 140, § 131(a)(b).[4]

As was the case under the prior Massachusetts statute, unless an applicant falls within one of the statutory exemptions, the licensing authority must issue a firearms identification card to the applicant. Mass. G.L. c. 140, § 129B.[5] Similarly, the standards for obtaining a

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[3] The First Circuit's decision contains a more comprehensive discussion of the relevant provisions of the Act. Pet. App. at 2a-8a.

[4] The term "large capacity weapon" is defined in Mass. G.L. c. 140, § 121. Although the petitioners below claimed that this term is unconstitutionally vague, they have not included such a claim in their petition in this Court.

[5] The state statutory disqualifications for both a firearms identification card and a license to carry are identical. These disqualifications are also virtually identical to those in the corresponding federal law, see 18 U.S.C. § 922(d)(1)-(9), as follows:

Class A license or a Class B license under the Act are essentially unchanged. The Act did, however, add two new statutory disqualifications – one for persons subject to a current abuse prevention order and the other for persons subject to an outstanding arrest warrant. Mass. G.L. c. 140, § 131(d)(vi), (vii). As was the case under the prior statute, even if no express disqualification applies, the licensing authority may nonetheless refuse to issue a Class A or Class B license upon a finding that the applicant is not a "suitable person" or that the applicant does not have a legitimate need for the license. Id. A licensing authority must state its reasons in writing for denying a license to carry, which decision is subject to judicial review. Mass. G.L. c. 140, § 131(e), (f).

The Act further provides that the colonel of the Massachusetts State Police may grant a Class A license to a gun club with an on-site shooting range, provided that the club is incorporated under the laws of Massachusetts and at least one shareholder thereof is suitable to be issued a Class A license. Mass. G.L. c. 140, § 131(a). A gun club with a Class A license may, in turn, allow persons who do not possess a Class A license to fire a large capacity weapon, provided that person is under the direct supervision of a certified firearms safety instructor or a club member who does have a Class A license. Id. The prohibition on shooting at targets that depict human figures, human effigies, human silhouettes and the like, only applies at gun clubs with a Class A license. Id. Hence, petitioners are free to circulate a newsletter or circular with whatever picture or message

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persons (i) convicted of a felony; (ii) with a history of mental illness; (iii) with a history of drug or alcohol abuse; (iv) under the age of 21; (v) an alien; (vi) currently subject to a domestic restraining order; or (vii) currently the subject of an outstanding arrest warrant. Mass. G. L. c. 140, §§ 129(B) & 131(d).

they like. Pet. App. at 27a-28a.[6]

Argument

I. This Case Presents No Important Question of Federal Law Requiring Resolution by this Court, but Only the Application of Settled Rules of Law to the Particular Facts Here.

In ruling that the Commonwealth's statutory prohibition against shooting at human image targets in Class A-licensed gun clubs does not violate the First Amendment, the First Circuit applied the legal standards established by this Court for First Amendment challenges to expressive conduct, first assessing whether such shooting is sufficiently communicative to constitute expression protected by the First Amendment, and second, determining whether the law forbidding such shooting is content-neutral or content-based. Pet. App. 23a-28a (*citing U.S. v. O'Brien*, 391 U.S. at 376, *Texas v. Johnson*, 491 U.S. at 404, *Ward v. Rock Against Racism*, 491 U.S. at 791, and *Clark v. Community for Creative Non-Violence*, 468 U.S. at 293). In accordance with this Court's decision in *O'Brien,* the First Circuit assumed without deciding that shooting at targets with human images is sufficiently expressive conduct to be entitled

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[6] Petitioners' claim that "[t]here are no scienter requirements" under the Act is both wrong as a matter of state law and irrelevant. Pet. at 4. Massachusetts' highest court has held that the wrongful possession of a firearm under state law does contain a knowledge requirement. *Commonwealth v. Sampson*, 383 Mass. 750, 762, 422 N.E.2d 450, 456-7 (1981). Moreover, petitioners have not preserved this or any other due process question in their petition in this Court.

to some degree of First Amendment protection. Pet. App. 25a. The First Circuit concluded, however, that the restriction imposed on such conduct under the Act is content-neutral and that it satisfies the intermediate scrutiny standard.

Although the petitioners disagree with the result the First Circuit reached, they do not dispute the correctness of the rules of law applied by that court; indeed, petitioners invoke the same legal rules from the same cases of this Court, in urging this Court to grant their petition. Thus, the question presented by the petition is merely whether the settled legal standards were correctly applied to the statute challenged in this case – that is, whether or not the First Circuit correctly decided that the challenged provision is content-neutral and satisfies the intermediate scrutiny standard. As such, this case is not an appropriate subject for review by this Court. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

A. The First Circuit Assumed Without Deciding That Shooting At Targets With Human Images Is Expressive Conduct Entitled To Some Degree of First Amendment Protection.

The issue that petitioners urge this Court to review is whether shooting at targets with a human image is expressive conduct protected by the First Amendment. Hence, much of the petition consists of argument that such shooting is "a significant form of political expression." Pet. at 7. Petitioners assert that there is "a long tradition of shooting at targets of historical tyrants," id. at 8, and analogize such shooting to the burning of the American flag, which this Court held in *Texas v. Johnson*, 491 U.S. at 406, to be "conduct

'sufficiently imbued with elements of communication' . . . to implicate the First Amendment." Petitioners assert that this case merits review by this Court because it "involves censorship of a particular type of expression not previously addressed by this Court." Pet. at 6.

The First Circuit, in response to this argument, first noted that "[n]o court has recognized target shooting as a constitutionally protected form of expression," but did not reject the petitioners' argument outright. Rather, noting petitioners' equivalence of such shooting to constitutionally protected flag-burning, the First Circuit assumed without deciding that shooting at targets with a human image "is expressive conduct entitled to some degree of First Amendment protection." Pet. App. 24a-25a. Thus, nothing in the opinion of the First Circuit suggests a reason why the issue presented warrants review by this Court. In any event, even if petitioners can support certiorari on an issue passed by the lower court, the First Amendment claim does not warrant review because the judgment of the court below in no way "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

B. The First Circuit Applied A Settled Standard In Determining That The Act Is Content-Neutral And Satisfies Intermediate Scrutiny.

The First Circuit cited this Court's decision in *Ward v. Rock Against Racism*, 491 U.S. at 791, for its holding that the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Pet. App. 25a. In determining content neutrality, the court first observed that the Act is content-neutral because "[t]here is an obvious connection between the

Commonwealth's interest in preventing gun fatalities and its decision to restrict the shooting practices of certain gun clubs," in that "[a] person who has practiced shooting at a human-shaped target will likely be more proficient at shooting humans than a person who has had to practice at a circular target." The First Circuit observed that the proscription on shooting at targets with human images applies to both "supporters of tyrants . . . and advocates of freedom." Pet. App. 25a. The court thus correctly concluded that the restriction is content-neutral "neither advancing nor impeding any particular viewpoints, but simply regulating a particular mode of potentially expressive conduct (target shooting) at a particular place (Class A-licensed gun clubs)." Id. at 25a-26a.[7]

Having determined that the Act is content-neutral, the First Circuit went on to apply intermediate scrutiny – the requirement that a statute be "narrowly tailored to serve a significant governmental interest," and that it "allow[] for reasonable alternative channels of communication," citing this Court's decisions in *Ward v. Rock Against Racism* and *Clark v. Community for Creative Non-Violence*. Pet. App. 26a. The First Circuit found that the Act satisfies this standard. It reasoned that preventing those unlicensed

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[7] Petitioners take issue, claiming that "[t]he legitimate State interest in discouraging murder is served by punishing murder, not by imposing censorship." Pet. at 14. The State Respondents do not dispute the notion that crime should be punished; however, the Massachusetts Legislature may also enact legislation essentially civil in nature to complement the state's criminal laws, as the Legislature did in passing the Act. It is well-settled that, "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the Legislature may think." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1954) (Douglas, J.) (citations omitted).

to use large capacity weapons from becoming proficient at shooting humans is a significant governmental interest;[8] that the restriction is narrowly tailored as it applies only in Class A-licensed gun clubs, which is the only place where a person who does not have a license for a large capacity weapon may shoot such a weapon; and that reasonable alternative channels of communication are available, that is, petitioners can convey their message by a variety of means, even including shooting at images at any place where target shooting is lawful other than gun clubs with a Class A license. Pet. App. 27a-28a.[9]

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[8] The First Circuit's conclusion that there is an obvious connection between preventing gun fatalities and prohibiting shooting at targets with human images with large capacity weapons has a sound empirical basis. *See People v. Nowos*, 2001 W.L. 736732, * 2 (Mich. Ct. App. 2001), *app. for lv. to app. den.*, 643 N.W.2d 573 (2002) (defendant convicted of manslaughter had practiced shooting with targets of human silhouettes); *Commonwealth v. Appel*, 547 Pa. 171, 689 A.2d 891, 894 (1997) (defendant convicted of murder had practiced shooting with human silhouette targets); *Commonwealth v. Hughes*, 536 Pa. 355, 639 A.2d 763, 768 (1994) (same); *Commonwealth v. Hodge*, 386 Mass. 165, 166, 434 N.E.2d 1246 (1982) (same).

[9] Petitioners contend that, "[t]he political content of this State-imposed message is that private citizens, but not the police, should be pacifists." Pet. at 10. First, the Act conveys no "message," political or otherwise. Moreover, State law enforcement personnel are not exempt from the licensing requirements of Chapter 140.

II. THERE IS NO CONFLICT OF DECISIONS TO WARRANT CERTIORARI.

Petitioners rightly do not contend that review by this Court is necessary to resolve any conflict between the First Circuit's decision and the decision of any other state or federal court. *Cf.* Sup. Ct. R. 10(b), (c) (listing such conflicts as among the "compelling reason[s]" this Court considers in determining whether to grant a petition for a writ of certiorari). As noted above, Massachusetts is the only state that prohibits shooting at targets with a human image. Research has disclosed no other decision by any American court, state or federal, with respect to the constitutionality of a restriction on the use of human image-like targets, and thus there is no conflict of decisions warranting review by this Court.

III. THE MASSACHUSETTS STATUE AT ISSUE IN THIS CASE IS NOT A MATTER OF NATIONAL IMPORTANCE OR APPLICABILITY.

A central consideration applied by this Court in determining whether to grant a petition for a writ of certiorari is whether the question presented is "important," not merely to the parties involved but to the public at large. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955). Contrary to petitioners' assertion that the freedom of expression claim made here is an "important question of federal law that has not been, but should be, settled by this Court," (Pet. at 6), this question has virtually no significance outside of Massachusetts because none of the other 49 states, the District of Columbia, or the Commonwealth of Puerto Rico, has a

prohibition against shooting at targets with a human image.[10] In sum, the question whether shooting at targets with a human image is sufficiently expressive conduct to warrant protection under the First Amendment, is one of significance in Massachusetts alone and apparently nowhere else in the United States. It therefore does not merit review by this Court.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[10] Petitioners apparently agree, asserting that the Act marks "the first time in world history" that shooting at targets with a human image has been prohibited. Pet. at 6.

(3)

Supreme Court, U.S.
FILED
JUL 29 2002
OFFICE OF THE CLERK

No. 01-1879

In the Supreme Court of the United States

GUN OWNERS' ACTION LEAGUE, INC.; OUTDOOR MESSAGE COOPERATIVE, INC.; MASSACHUSETTS SPORTSMEN JUNIOR CONSERVATION CAMP, INC., *et al.*,

Petitioners

v.

JANE SWIFT, Acting Governor, Commonwealth of Massachusetts, *et al.*,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

The First Circuit has invented a new exception to the right to free speech and press: persons may not shoot at targets with human images because such defacement encourages gun violence. The court does not appeal to any of the rationales in this Court's First Amendment jurisprudence. It does not suggest the applicability of the test set forth in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), which held that the First Amendment does not permit the state "to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Brandenburg and its progeny would seem to be the only applicable set of precedents, but their application here would be a Great Leap Forward from the rule as it now stands. Shooting at a picture of a human image, whether the picture depicts Osama bin Laden or is a caricature of a criminal, does not constitute advocacy of a violation of law, is not directed to inciting imminent lawless action, and is not likely to incite such action. Indeed, such defacement is often an expression of patriotism.

Governor Swift[1] argues that this case presents no important question of federal law requiring resolution by this Court, but only the application of settled rules of law to the facts here. State Respondents' Brief in Opposition (hereafter "Br.") at 8. To the contrary, the law at issue is a wholly new

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[1] "Swift" refers to Acting Governor Jane Swift and the other respondents.

form of censorship which this Court has never directly addressed. Further, the First Circuit's decision introduces a completely novel and unprecedented argument never before heard in First Amendment jurisprudence: that the defacement of a picture of a human -- in this case, by shooting at such picture as a target -- may be censored to prevent "gun fatalities." Br. 12 n.8. This pushes the envelop far beyond the standard as most recently articulated in *Ashcroft v. Free Speech Coalition*, 152 L. Ed. 2d 403, 122 S. Ct. 1389, 1399 (2002), as follows: "The prospect of crime, however, by itself does not justify laws suppressing protected speech."

In exchange for being subject to the censorship, the Act essentially offers immunity for what would otherwise be a serious felony. The Act imposes 2½ to 10 years imprisonment for mere possession of a "large capacity" weapon or feeding device.[2] While a person with a Class A or Class B license is exempt from this prohibition, such licenses are discretionary with the police.[3] However, a club may obtain a Class A license, and a non-licensee may possess a large capacity weapon at such club.

That is where the First Amendment violation arises:

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[2] Massachusetts General Laws ("M.G.L."), § 121 of Ch. 140, § 10(m) of Ch. 269. This part of the enactment belies Swift's denial that the Act "radically criminalized previously-lawful conduct." Br. 6, citing Petition at 4.

[3] As Swift recognizes, "even if no express disqualification applies, the licensing authorities may nonetheless refuse to issue a Class A or Class B license upon a finding that the applicant is not a 'suitable person' or that the applicant does not have a legitimate need for the license." Br. 7, citing M.G.L. c. 140, § 131(d)(vi), (vii).

"Such club shall not permit shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof . . . ." M.G.L., Ch. 140, § 131(a) (¶ 2, last sentence). This restricts such shooting with any kind of gun whatever.[4]

Despite this being apparently the first such censorship of its type in world history, Swift argues that there is nothing here for this Court to decide. The First Circuit stated that "[n]o court has recognized target shooting as a constitutionally protected form of expression." Br. 10, citing Pet. App. 24a-25a. One would think that, where freedom of expression is concerned, the relevant point would be that no court has (until now) denied that shooting at a target of, say, Adolf Hitler is constitutionally protected.[5]

The First Circuit assumed without deciding that shooting at targets with human images "is expressive conduct entitled to some degree of First Amendment protection," but found that protection to be overridden by the state interest in

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[4] Swift consistently misstates the statute as prohibiting "shooting a high capacity weapon at a target with a human figure or effigy, in Class A-licensed gun clubs." *E.g.*, Br. 3. The above statutory language prohibits shooting at a target with a human image with *any* type of gun, even a BB gun.

[5] It is not as if petitioners' Hitler target was the first of its kind, as such targets were part of the popular culture as political expression during World War II. For instance, the 1944 Universal Pictures film *Spider Woman* included "a moving life-sized cutout of Hitler being used as a shooting gallery target." Chris Steinbrunner *et al.*, *The Films of Sherlock Holmes* (Citadel Press, 1978), 124. The target was a frowning caricature of Hitler punctured with bullet holes. *Id.* at 120 (illustration).

preventing "gun fatalities." *Id.* at 10-11. But Swift begs the question when she argues that the opinion does not conflict with relevant decisions of this Court. Br. 10. Neither the First Circuit nor Swift suggests that the censorship here is somehow a logical extension of the *Brandenburg* rule or some other rule.

Swift insists that the First Circuit correctly stated and applied this Court's jurisprudence concerning content neutrality, but this Court has never even hinted that censorship would be justified by the reasons suggested by the First Circuit:

> There is an obvious connection between the Commonwealth's interest in preventing gun fatalities and its decision to restrict the shooting practices of certain gun clubs. A person who has practiced shooting at a human-shaped target will likely be more proficient at shooting humans than a person who has had to practice at a circular target.

Br. 10-11, quoting Pet. App. at 24a. This Court's formulation in *Brandenberg* and its progeny is completely left out of the analysis.

Nor has this Court ever sanctioned censorship because it "applies to both 'supporters of tyrants . . . and advocates of freedom.'" Br. 11, quoting Pet. App. 25a. This is supposedly content neutral because no particular viewpoint is advanced or impeded, and only "a particular mode of potentially expressive conduct . . . at a particular place" is prohibited. Br. 11, citing 25a-26a. This is like arguing that censorship is justified and is content neutral if it bans speech by Republicans and Democrats

alike, and if it bans only "a particular mode of potentially expressive conduct" (say defacing a copy of the opposition party's platform) "at a particular place" (like a state-licensed club of some kind). This Court's precedents concerning content neutrality have never been extended in this fashion to ban expression of a given type under the guise that the censorship extends to persons with political views on both sides of the fence.

Swift next argues that the First Circuit properly applied intermediate scrutiny[6] and that the Act satisfies this standard because "preventing those unlicensed to use large capacity weapons from becoming proficient at shooting humans is a significant governmental interest . . . ." But the Act makes no such declaration of intent, and "we have never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000). Moreover, *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 122 S. Ct. 2080, 2002 U.S. LEXIS 4422, *36-37 (2002) (Breyer, J., concurring, joined by Souter and Ginsburg, JJ.), explains:

> In the intermediate scrutiny context, the Court ordinarily does not supply reasons the legislative body has not given. *Cf. United States*

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[6] Although the censorship here does not pass intermediate scrutiny, this case involves political expression to which the strict scrutiny standard applies. Swift has the burden to prove that the ban "is (1) narrowly tailored, to serve (2) a compelling state interest," and thus must demonstrate that it does not "unnecessarily circumscribe protected expression." *Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2002 U.S. LEXIS 4883, *17 (2002). Swift has not even attempted to do so.

> *v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 . . . (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions") . . . . It does mean that we expect a government to give its real reasons for passing an ordinance. . . . I can only conclude that if the village of Stratton thought preventing burglaries and violent crimes was an important justification for this ordinance, it would have said so.

Swift further asserts: "The First Circuit's conclusion that there is an obvious connection between preventing gun fatalities and prohibiting shooting at targets with human images with large capacity weapons has a sound empirical basis." Br. 12 n.8. The only evidence for this "sound empirical basis" is a citation to four cases in which persons convicted of unlawful homicides had possessed or practiced with human silhouette targets.[7] This is like saying that if an arsonist ever burned an American flag, flag burning could be banned because there is "a sound empirical basis" that it leads to arson. *Ashcroft v. Free Speech Coalition*, 122 S. Ct. at 1403, rejected a similar argument as follows:

> The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in

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[7] One such case, *Commonwealth v. Hughes*, 536 Pa. 355, 365, 639 A.2d 763, 768 (1994), states only that the defendant obtained such targets, and further notes that he committed murder at point blank range, where target skills were irrelevant.

> illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.

After making this grim argument about how shooting at paper targets with human images leads to murder, Swift shifts gears and argues that the censorship is not significant because "alternative channels of communication are available," including "shooting at images at any place where target shooting is lawful other than gun clubs with a Class A license." Br. 12, citing Pet. App. 27a-28a. If censoring targets was really significant in reducing homicides, the legislature would have enacted a state-wide prohibition applicable at all shooting ranges, licensed and unlicensed. In *Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2002 U.S. LEXIS 4883, *26-27, this Court found the purported purpose of the free speech restriction in that case to be

> so woefully underinclusive as to render belief in that purpose a challenge to the credulous. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994) (noting that underinclusiveness "diminishes the credibility of the government's rationale for restricting speech"); *Florida Star v. B.J.F.*, 491 U.S. 524, 541-542 (1989) (Scalia, J., concurring in judgment) ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest

unprohibited" . . .).[8]

Since the Act prohibits all persons from shooting at pictures of humans at licensed ranges but exempts "public safety personnel performing in line with their official duties," M.G.L. § 131(a) (¶ 2, last sentence), the political content of this State-imposed message is that private citizens, but not the police, should be pacifists. Swift responds that "the Act conveys no 'message,' political or otherwise. Moreover, State law enforcement personnel are not exempt from the licensing requirements of Chapter 140." Yet these denials cannot obliterate the Act's inherent pacifist message: citizens should not think or even fantasize about shooting a human, whether Hitler, bin Laden, or an attacking criminal, but the police should have such thoughts and should hone their skills in shooting dangerous suspects.

Since pacifists reject the use of force in all circumstances, they may have a negative attitude toward shooting at targets with human images. In *Polsky v. Wetherill*, 455 F.2d 960, 961 (10th Cir. 1972), a conscientious objector described his views as follows: "In basic training I became aware of the metamorphosis that lead me to my present position. In the evenings, after training, I began thinking about the human silhouettes we fired at during range week . . . and finally the realization that I could not possibly continue, in good concious [*sic*], to participate in an army."

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[8] The specific restriction in that case "fails strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms." *Id.* at *32.

In appealing to the alleged purpose of discouraging "gun fatalities," the First Circuit has not articulated any of the exceptions to the First Amendment which exist in this Court's jurisprudence. *Republican Party of Minn.*, 2002 U.S. LEXIS at *47-48 (Kennedy, J., concurring), explains about such cases:

> [C]ontent-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests. . . . "Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld." (Citation omitted.)

The free speech claim in this case is an important question of federal law which has not been, but should be, settled by this Court. Swift argues that the issue here "is one of significance in Massachusetts alone and apparently nowhere else in the United States," since no other state has such a law. Br. 14. This ignores that "Massachusetts alone" consists of nearly six and a half million people, all of whom have First Amendment rights. There are far more gun owners in the Commonwealth who would like to shoot at a target of Osama bin Laden than there are persons who burn the American flag.

Moreover, this Court has been solicitous of protecting First Amendment rights from new and unique threats.[9] *Wooley v. Maynard*, 430 U.S. 705 (1977), invalidated a law that existed in only one state that required drivers to post a political message on their automobile license plates. The law posed a novel threat to free speech: whether a state may "require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." *Id.* at 713. That message – "Live Free or Die" – was at the opposite end of the ideological spectrum from Massachusetts' pacifist message here. As the plaintiff in that case stated in part, "I also disagree with the motto on political grounds. I believe that life is more precious than freedom." *Id.* at 708. This Court held that he could not be required to display that message.

Similarly, this Court should decide whether the unprecedented censorship in this case and the unprecedented justification therefor are consistent with the First Amendment rights to free speech and press.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit.

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[9] *See Watchtower Bible & Tract Society of New York*, 122 S. Ct. 2080, 2002 U.S. LEXIS 4422, *13 ("Those cases involved petty offenses that raised constitutional questions of the most serious magnitude -- questions that implicated the free exercise of religion, the freedom of speech, and the freedom of the press.").

Respectfully submitted,

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